

MONTANA LEGISLATIVE HISTORY

Chapter 534 19 97

Bill H 293 S _____

Original bill & history ☒ c

H. Committee on Natural Resources S. Committee on Natural Resources

Hearing Date(s) _____ c

1/29 ☒ c

2/10 ☒ c

Date Out

2/14 ☒ c

Hearing Date(s) _____ c

3/17 ☒ c

4/2 ☒ c

out 4/3 ☒ c

Did this bill originate in an interim committee? ____ Yes ____ No

Committee _____

Report _____

LEGISLATIVE HISTORIES

The 1997 Montana Legislature dramatically changed the nature of legislative minutes. This altered format continues with the 1999 legislative minutes. The minutes from House committees are extremely sparse in content, offering no substantive information from which to glean legislative intent. The Senate committees' minutes are fuller in content.

Exhibits, which include written statements, attendant information, roll call votes, roll call attendance, a list of those from the public who were present, and specific action taken on legislative bills, will be available only through the Historical Society Archives, 444-4774, and from a CD-ROM produced by the Legislative Services Division, 444-3064.

Just as in the 1997 legislative session, the 1999 House and Senate committee hearings were recorded. For information on accessing the tapes, or purchasing them, contact the Archives, 444-4774.

If you have concerns over the format of these legislative minutes, it is suggested that you contact your state legislators.

3/17 SIGNED BY GOVERNOR
CHAPTER NUMBER 68
EFFECTIVE DATE: 10/01/97

HB 293 INTRODUCED BY ORR *LC0514 DRAFTER: MITCHELL*
PROVIDE FOR CERTAIN VOLUNTARY ENVIRONMENTAL AUDITS

1/18	INTRODUCED		
1/18	FIRST READING		
1/18	REFERRED TO NATURAL RESOURCES		
1/29	HEARING		
2/18	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/22	2ND READING PASSED	66	33
2/26	3RD READING PASSED	65	34
	TRANSMITTED TO SENATE		
3/03	FIRST READING		
3/03	REFERRED TO NATURAL RESOURCES		
3/17	HEARING		
4/04	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
4/05	2ND READING CONCURRED AS AMENDED	30	20
4/07	3RD READING CONCURRED	29	21
	RETURNED TO HOUSE WITH AMENDMENTS		
4/15	2ND READING AMENDMENTS CONCURRED	55	44
4/16	3RD READING CONCURRED AS AMENDED	58	41
4/24	SIGNED BY SPEAKER		
4/24	SIGNED BY PRESIDENT		
4/25	TRANSMITTED TO GOVERNOR		
5/05	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 534		
	EFFECTIVE DATE: 10/01/97		

HB 294 INTRODUCED BY COBB *LC0113 DRAFTER: MARTIN*
REQUIRE THE LEGISLATIVE AUDIT COMMITTEE TO CONDUCT A
PERFORMANCE AUDIT OF THE PROPERTY REAPPRAISAL SYSTEM
USED BY THE PROPERTY ASSESSMENT DIVISION OF THE
DEPARTMENT OF REVENUE FOR THE APPRAISAL OF RESIDENTIAL AND
COMMERCIAL PROPERTY

1/18	INTRODUCED		
1/18	FIRST READING		
1/18	REFERRED TO TAXATION		
1/22	HEARING		
1/23	COMMITTEE REPORT—BILL PASSED		
1/24	2ND READING PASSED	91	7
1/25	3RD READING PASSED	89	6
	TRANSMITTED TO SENATE		
1/27	FIRST READING		
1/27	REFERRED TO FINANCE & CLAIMS		
2/03	HEARING		
2/11	HEARING		
2/12	COMMITTEE REPORT—BILL CONCURRED		
3/04	2ND READING CONCUR MOTION FAILED	8	39

HB 295 INTRODUCED BY RANEY, ET AL. *LC0442 DRAFTER: PETESCH*
REVISE THE ALLOCATION AND USE OF THE LODGING FACILITY USE TAX

1/18	INTRODUCED
1/18	FIRST READING
1/18	REFERRED TO TAXATION

House BILL NO. 293

INTRODUCED BY ORR

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR CERTAIN VOLUNTARY ENVIRONMENTAL AUDITS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 6] may be cited as the "Voluntary Environmental Audit Act".

NEW SECTION. Section 2. Purpose. The legislature finds that environmental protection and environmental quality will be enhanced by incentives to voluntarily identify and remedy violations of environmental laws and that the public will be benefited by the voluntary identification and remedy. The legislature further finds that nothing in [sections 3 through 6] is intended to inhibit or to be a substitute for the exercise of the regulatory authority by those agencies entrusted with protecting Montana's environment.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 6], the following definitions apply:

(1) "Department" means the:

- (a) department of justice provided for in 2-15-2001;
- (b) department of agriculture provided for in 2-15-3001; or
- (c) department of environmental quality provided for in 2-15-3501.

(2) "Environmental audit" is a periodic, documented, voluntary internal assessment, evaluation, or review not required by law, rule, or permit that is conducted by a regulated entity or its agent and initiated by the regulated entity for the purpose of determining compliance with environmental law, rule, or permit enforced by the department.

NEW SECTION. Section 4. Immunity from imposition of civil, criminal, or administrative penalties

1 for violations found and disclosed. Except for a violation of Title 82, chapter 4, parts 1 and 2, the
2 department may not pursue civil or administrative penalties or criminal prosecution or penalties against a
3 regulated entity or its agent acting within the scope of the agent's authority for violations discovered during
4 an environmental audit and disclosed to the department in writing within 30 days after the violation is
5 determined to exist if the following conditions are met:

6 (1) a written compliance schedule is negotiated between the department and the regulated entity
7 to promptly correct violations disclosed unless the violation has been resolved to the satisfaction of the
8 department at the time of the disclosure;

9 (2) the regulated entity takes steps to prevent recurrence of the violation; and

10 (3) the regulated entity cooperates with the department and provides information that is necessary
11 for the implementation of [sections 1 through 6].
12

13 **NEW SECTION.** Section 5. Submission and use of environmental audit information. (1) If a
14 regulated entity discloses a violation to the department that is found during an environmental audit, the
15 disclosure must be submitted on a form provided by the department and must include all information
16 requested on the department form.

17 (2) (a) The department may not request an environmental audit. Information compiled by the
18 regulated entity as a result of an environmental audit is subject to discovery according to the rules of civil
19 or criminal procedure. Any information contained in an environmental audit form pertaining to violations
20 that were discovered as a result of the audit and disclosed and corrected as required by [sections 1 through
21 6] may not be used by the department against the regulated entity in any administrative hearing or judicial
22 action.

23 (b) The prohibition in subsection (2)(a) does not apply to the use of voluntary statements made in
24 connection with the information when offered for impeachment purposes or in a subsequent action for
25 perjury, false statement, or contempt.

26 (3) Documents, communications, compliance data, reports, or other information required to be
27 collected, developed, maintained, or reported to the department according to state law, rule, or permit are
28 not covered by the provisions of [sections 1 through 6].
29

30 **NEW SECTION.** Section 6. Limitations on applicability. (1) [Sections 1 through 6] do not apply

1 if:

2 (a) the regulated entity purposely or knowingly violated state or federal environmental law, rule,
3 regulation, or permit;

4 (b) the regulated entity has established a pattern of repeatedly violating an environmental law, rule,
5 regulation, permit, order, or compliance schedule within the 3 years before the date of the disclosure at the
6 same facility;

7 (c) the regulated entity has not corrected the violations according to the negotiated compliance
8 schedule described in [sections 1 through 6];

9 (d) before the date of the environmental audit through which a violation was discovered, an
10 investigation or an administrative or judicial proceeding regarding the specific voluntarily disclosed violation
11 is initiated by the department;

12 (e) after [the effective date of this act], a federal agency specifically prohibits the use of
13 environmental audits as a condition for maintaining or obtaining primacy over a federally delegated program;
14 or

15 (f) the violation disclosed to the department by the regulated entity caused substantial damage to
16 human health or the environment.

17 (2) An environmental audit may not be used to prevent the department from carrying out its
18 statutory or regulatory functions.

19
20 **NEW SECTION. Section 7. Severability.** If a part of [this act] is invalid, all valid parts that are
21 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its
22 applications, the part remains in effect in all valid applications that are severable from the invalid
23 applications.

24
25 **NEW SECTION. Section 8. Saving clause.** [This act] does not affect rights and duties that
26 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this
27 act].

28
29 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through 6] are intended to be
30 codified as an integral part of Titles 75 and 80, and the provisions of Titles 75 and 80 apply to [sections

1 1 through 6].

2

-END-

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairman Dick Knox, on January 29, 1997, at
3:06 p.m., in Room 437

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Hal Harper, Vice Chairman (Minority) (D)
Rep. Haley Beaudry (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Doug Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney
Rep. Trudi Schmidt (D)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

Members Excused: none

Members Absent: none

Staff Present: Kathleen Williams, Legislative Services
Stephanie Braun, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 293, HB 329
Executive Action: HB 181 Tabled (15-3), HB 284
DO PASS as amended (18-0), HB
288 DO PASS as amended (18-0)

HEARING ON HB 293

Opening Statement by Sponsor: Rep. Scott Orr, HD 82 opened
introduced an amendment marked Exhibit #2 (hb029301.alm)
{Tape: 1; Side: a; Approx. Time Count: 3.0; Comments: Exhibit
#2.}

Proponents' Testimony:

Tom Ezrie Attorney from Billings, Exxon

{Tape: 1; Side: a; Approx. Time Count: 11.8; Comments: none.}

Riley Johnson, National Federation of Independent Businesses (NFIB)

{Tape: 1; Side: a; Approx. Time Count: 16.5; Comments: none.}

Steve Pilcher, Western Environmental Trade Association (WETA)

{Tape: 1; Side: a; Approx. Time Count: 19.1; Comments: none.}

Mike Voellor, Lee Newspapers of Montana would support Bill with amendment ensuring the information on the form was "public information"

{Tape: 1; Side: a; Approx. Time Count: 20.6; Comments: none.}

Tom Donbert, WMX/Waste Management, Inc., north of Great Falls

{Tape: 1; Side: a; Approx. Time Count: 21.6; Comments: none.}

Candace Torgerson, BEI and Coalstrip Energy Limited Partnership (CELP)

{Tape: 1; Side: a; Approx. Time Count: 23.0; Comments: none.}

Ken Williams, MT Power Company

{Tape: 1; Side: a; Approx. Time Count: 24.0; Comments: none.}

Gail Abercrombie, MT Petroleum Association

{Tape: 1; Side: a; Approx. Time Count: 25.3; Comments: none.}

Pam Langley, MT Agricultural Business Association submitted Exhibit #3

{Tape: 1; Side: a; Approx. Time Count: 28.0; Comments: Exhibit #3.}

Hertha Lund, MT Farm Bureau (MFB)

{Tape: 1; Side: a; Approx. Time Count: 30.9; Comments: none.}

{Tape: 1; Side: a; Approx. Time Count: very end; Comments: flipped tape at the very end.}

{Tape: 1; Side: b; Approx. Time Count: 0.1; Comments: Hertha Lund.}

Frank Crowley, ASARCO

{Tape: 1; Side: b; Approx. Time Count: 0.6; Comments: none.}

Mike Murphy, MT Water Resource Association

{Tape: 1; Side: b; Approx. Time Count: 3.5; Comments: none.}

Jan Sensibaugh, Department of Environmental Quality submitted Exhibit #4, Exhibit #15

{Tape: 1; Side: b; Approx. Time Count: 3.9; Comments: Exhibit #4 & #15.}

Dexter Busby, MT Mining Association

{Tape: 1; Side: b; Approx. Time Count: 7.2; Comments: none.}

Don Allen, MT Wood Products Association

{Tape: 1; Side: b; Approx. Time Count: 7.6; Comments: none.}

Rex Manual, Cennex Petroleum Division

{Tape: 1; Side: b; Approx. Time Count: 9.2; Comments: none.}

Chris Gallus, MT Chamber

{Tape: 1; Side: b; Approx. Time Count: 9.4; Comments: none.}

Opponents' Testimony:

Ted Lange, Northern Plains Resource Council

{Tape: 1; Side: b; Approx. Time Count: 10.5; Comments: none.}

Chris Cerquone, Missoula County Health Department

{Tape: 1; Side: b; Approx. Time Count: 18.9; Comments: none.}

Paul Johnson, self

{Tape: 1; Side: b; Approx. Time Count: 23.3; Comments: none.}

Peter Funk, MT Council of Trout Unlimited

{Tape: 1; Side: b; Approx. Time Count: 29.2; Comments: none.}

{Tape: 1; Side: b; Approx. Time Count: end; Comments: flipped tape at the very end.}

{Tape: 2; Side: a; Approx. Time Count: 0.1; Comments: still Peter Funk.}

Debbie Smith, MT Chapter of the Sierra Club

{Tape: 2; Side: a; Approx. Time Count: 0.7; Comments: none.}

Anne Hedges, Montana Environmental Information Center (MEIC)
submitted Exhibit #5

{Tape: 2; Side: a; Approx. Time Count: 4.4; Comments: Exhibit #5.}

Michael Downey, concerned citizen

{Tape: 2; Side: a; Approx. Time Count: 9.3; Comments: none.}

Tony Tweedel, MT-CHEER, Missoula

{Tape: 2; Side: a; Approx. Time Count: 12.7; Comments: none.}

Janet Ellis, MT Audubon submitted Exhibit #6

{Tape: 2; Side: a; Approx. Time Count: 20.9; Comments: Exhibit #6.}

Brett Brownscombe, MT Wildlife Federation

{Tape: 2; Side: a; Approx. Time Count: 22.8; Comments: none.}

Exhibit #7 submitted by Peter Nielsen, Acting Director of Missoula City-County Health Department (exhibit only no testimony on tape)

Cesar Hernandez, Cabinet Resource Group

{Tape: 2; Side: a; Approx. Time Count: 28.4; Comments: none.}

{Tape: 2; Side: a; Approx. Time Count: end; Comments: flipped tape at the very end.}

Alicia Bradshaw, Greater Yellowstone Valley, submitted Exhibit #8
{Tape: 2; Side: b; Approx. Time Count: 0.4; Comments: Exhibit #8.}

John Krutar, Blackfoot Legacy

{Tape: 2; Side: b; Approx. Time Count: 0.7; Comments: none.}

Niel Brown, owns a Brewery

{Tape: 2; Side: b; Approx. Time Count: 1.3; Comments: none.}

James Emerson, Self, concerned citizen

{Tape: 2; Side: b; Approx. Time Count: 1.9; Comments: none.}

Wade Sikorski, self submitted letter in opposition to HB 293, marked as Exhibit #1

Informational Testimony:

Beth Baker, representing the Department of Justice, submitted suggesteds for amendments Exhibit #9, also filled out a Witness Statement form marked as Exhibit #10

{Tape: 2; Side: b; Approx. Time Count: 2.3; Comments: Exhibit #9 & #10.}

Erik Fink, EPA marked as Exhibit #19 (information provided by Mr. Fink upon Committee's request, given to the Committee on 1/30/97 and entered into the record)

{Tape: 3; Side: a; Approx. Time Count: 12.3; Comments: Exhibit #18.}

Questions From Committee Members and Responses:

{Tape: 2; Side: b; Approx. Time Count: 3.9; Comments: none.}

{Tape: 2; Side: b; Approx. Time Count: end; Comments: flipped tape at the very end.}

{Tape: 3; Side: a; Approx. Time Count: 0.1; Comments: none.}

Closing by Sponsor: Rep. Orr closes

{Tape: 3; Side: a; Approx. Time Count: 25.3; Comments: none.}

{Tape: 3; Side: a; Approx. Time Count: end; Comments: flipped tape at the very end.}

Rep. Knox appoints a Subcommittee to study the amendments and comments from proponents and opponents to the Bill. Subcommittee consists of Rep. Orr, Rep. Story, Rep. Mood, Rep. Ellingson, Rep. Swanson. Committee will take Executive Action on this Bill in one week (2/5/97).

{Tape: 3; Side: b; Approx. Time Count: 0.3; Comments: none.}

HEARING ON HB 329

Opening Statement by Sponsor: Rep. Jon Ellingson, HD 65 opened, introduced Exhibit #11 amendment hb032901.amc

{Tape: 3; Side: b; Approx. Time Count: 1.7; Comments: Exhibit #11.}

Proponents' Testimony:

Patrick Judge, Montana Environmental Information Center, submitted Exhibit #16

{Tape: 3; Side: b; Approx. Time Count: 10.1; Comments: Exhibit #16.}

Hope Stevens, self, farm on Marysville road

{Tape: 3; Side: b; Approx. Time Count: 15.7; Comments: none.}

Chris Gingerelli, Missoula City Council, provided Exhibit #12

{Tape: 3; Side: b; Approx. Time Count: 17.2; Comments: Exhibit #12.}

John Krutar, Blackfoot Legacy

{Tape: 3; Side: b; Approx. Time Count: 19.6; Comments: none.}

Stan Frazier, MT Wildlife Federation

{Tape: 3; Side: b; Approx. Time Count: 23.5; Comments: none.}

Debbie Smith, MT Chapter of the Sierra Club

{Tape: 3; Side: b; Approx. Time Count: 24.1; Comments: none.}

Peter Funk, Council of Trout Unlimited

{Tape: 3; Side: b; Approx. Time Count: 24.8; Comments: none.}

Jim Emerson, self, Helena resident

{Tape: 3; Side: b; Approx. Time Count: 25.7; Comments: none.}

Ted Lange, Northern Plains Resource Council

{Tape: 3; Side: b; Approx. Time Count: 26.6; Comments: none.}

Bob Stevens, lives northwest of Helena

{Tape: 3; Side: b; Approx. Time Count: 27.4; Comments: none.}

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairman Dick Knox, on February 10, 1997, at
3:00 p.m., in Room 437

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Hal Harper, Vice Chairman (Minority) (D)
Rep. Haley Beaudry (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Doug Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney
Rep. Trudi Schmidt (D)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

Members Excused: none

Members Absent: none

Staff Present: Kathleen Williams, Legislative Services
Stephanie Braun, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 437 (2/6), HB 450 (2/6),
HB 427 (2/6)
Executive Action: HB 293 deferred

HEARING ON HB 437

Opening Statement by Sponsor:

Rep. Haley Beaudry, HD #35

{Tape: 1; Side: a; Approx. Time Count: 1.4; Comments: none.}

EXECUTIVE ACTION ON HB 293

Motion: Rep. Orr; DO PASS

Amendments: hb029302.alm submitted by Rep. Orr

Discussion: Rep. Orr discussed the Subcommittee meeting. Rep. Orr did not follow "majority vote" on the amendments that he just handed out to the Committee to review. Rep. Orr decided which amendments that were submitted by various testimony's given would fit, coincide and make the Bill better.

{Tape: 3; Side: b; Approx. Time Count: 3.1; Comments: none.}

Rep. Swanson said the subcommittee met 3 times and Rep. Orr made all the decisions.

{Tape: 3; Side: b; Approx. Time Count: 6.9; Comments: none.}

Rep. Orr moved the amendments. Rep. Orr went through each amendment and addressed the change(s) that each would implement.

{Tape: 3; Side: b; Approx. Time Count: 8.9; Comments: none.}

Rep. Orr had Larry Mitchell handout a "grey" bill that incorporated all the amendment changes so that the Committee could see how Hb 293 would read with amendments.

{Tape: 3; Side: b; Approx. Time Count: 16.1; Comments: none.}

Rep. Knox had a five minute conference with only the Subcommittee members and informed them that he would like them to meet again and come to a consensus vote on the amendments that will be presented to the Committee.

{Tape: 3; Side: b; Approx. Time Count: 18.9; Comments: none.}

Motion/Vote:

Vote:

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
55th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Chairman Dick Knox, on February 14, 1997, at
3:08 p.m., in Room 437

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Hal Harper, Vice Chairman (Minority) (D)
Rep. Haley Beaudry (R)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. Doug Mood (R)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Bob Raney
Rep. Trudi Schmidt (D)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

Members Excused: Rep. Swanson, Rep. Stovall

Members Absent: none

Staff Present: Kathleen Williams, Legislative Services
Stephanie Braun, Committee Secretary

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 507 (2/10), HB 506 (2/10),
~~HB 486 (2/10)~~

Executive Action: HB 293 DO PASS AS AMENDED (12-6), HB 486 (18-0), HB 506 DO
PASS AS AMENDED (18-0), HB 507
DO PASS AS AMENDED (18-0), HB
408 DO PASS AS AMENDED (18-0),
HB 427 Tabled (18-0), HB 452
Tabled (15-3), HB 475 Tabled
(11-7)

EXECUTIVE ACTION ON HB 293

Motion: Rep. Orr, moved DO PASS

{Tape: 1; Side: b; Approx. Time Count: 9.6; Comments: none.}

Amendments: hb029302.alm, Rep. Orr moved the amendment

Discussion: Rep. Raney

{Tape: 1; Side: b; Approx. Time Count: 12.0; Comments: none.}

Motion/Vote: amendment passes (12-6) (Reps. Ellingson, Tuss, Schmidt, Raney, Harper & Swanson voted against the amendment)

Discussion: Rep. Raney, Rep. Ellingson, there is a difficulty in proving knowing and purposeful

{Tape: 1; Side: b; Approx. Time Count: 14.8; Comments: none.}

Rep. Orr this is a concern. In the last session I introduced this Bill with "immunity" and "privilege". In this Bill gave up privilege the form is public. That's why we need to keep the "immunity" from civil and criminal penalties. People are afraid to call state Government to get help. Net result hoping to achieve is to get the problem out in the open so it can get cleaned up.

{Tape: 1; Side: b; Approx. Time Count: 18.6; Comments: none.}

Rep. Ellingson is uncomfortable with a few points in Rep. Orr's Bill and offers and moves his own set of amendments. He would like to have "criminal" stricken from the Bill. Is very uncomfortable with giving "criminal immunity". Criminals should not be in the Bill, but does agree there should be incentives in the Bill.

{Tape: 1; Side: b; Approx. Time Count: 21.8; Comments: none.}

Rep. Ellingson felt that the time limit of letting the Dept. know 30 days was too lenient, should let Dept. know sooner or perhaps insert "within" 30 days versus letting them know for 30 days and then disclosing; he is concerned that there may be something that needs immediate attention.

{Tape: 1; Side: b; Approx. Time Count: 25.1; Comments: none.}

Rep. Ellingson is concerned about the "civil" administrative penalties; he feels that a company may have an economic gain or advantage over a competitor who is complying. Feels all information from the "environmental audit" should be made public with the exception of information deemed "proprietary". Also feels there needs to be a sunset clause to revisit the bill and see how its working or not working and what could be done to make it better.

{Tape: 1; Side: b; Approx. Time Count: 26.0; Comments: none.}

Rep. Orr addresses Rep. Ellingson's comments.

{Tape: 1; Side: b; Approx. Time Count: 28.2; Comments: none.}

Larry Mitchell discusses the proposed Ellingson amendments.
{Tape: 1; Side: b; Approx. Time Count: 30.0; Comments: none.}

Rep. Curtiss commented then Rep. Tash. Rep. Tash moves to Table the amendments. Rep. Harper feels its not "proper" to Table amendments.

{Tape: 1; Side: b; Approx. Time Count: 31.3; Comments: none.}

Rep. Tash moves a "DO NOT PASS" amendments.

{Tape: 1; Side: b; Approx. Time Count: 34.7; Comments: none.}

Discussion: Rep. Orr addresses Rep. Ellingson's amendments.

{Tape: 1; Side: b; Approx. Time Count: 35.0; Comments: none.}

Vote on Ellingson amendments: Question was called for, amendment fails (12-6) (Reps. Ellingson, Harper, Raney, Schmidt, Tuss, Swanson)

Discussion: Rep. Beaudry

{Tape: 1; Side: b; Approx. Time Count: 43.3; Comments: none.}

Rep. Harper

{Tape: 1; Side: b; Approx. Time Count: 44.0; Comments: none.}

Rep. Curtiss feels that we are assuming people are guilty.

{Tape: 2; Side: a; Approx. Time Count: 0.1; Comments: none.}

Rep. Mood thinks the Bill contains safeguards.

{Tape: 2; Side: a; Approx. Time Count: 1.4; Comments: none.}

Vote: Question called for, motion HB 293 with amendment hb029302.alm DO PASS carried (12-6) (Reps. Ellingson, Raney, Harper, Schmidt, Tuss, Swanson voted no)

EXECUTIVE ACTION ON HB 427

Motion/Vote: Rep Raney moved to Table; 18-0 HB 427 Tabled

EXECUTIVE ACTION ON HB 452

Motion: Rep. Tuss; DO PASS

Discussion: Rep. Story feels each sign would have to be made specifically

{Tape: 2; Side: a; Approx. Time Count: 7.5; Comments: none.}

Rep. Beaudry feels this is something he doesn't want to do.

{Tape: 2; Side: a; Approx. Time Count: 8.0; Comments: none.}

Rep. Raney, Rep. Orr, Rep. Raney, Rep. Wagner, Rep. Curtiss

{Tape: 2; Side: a; Approx. Time Count: 9.8; Comments: none.}

Rep. Curtiss moves DO NOT PASS substitute motion of Table

{Tape: 2; Side: a; Approx. Time Count: 15.3; Comments: none.}

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 17, 1997,
at 3:00 PM, in Room 312-1

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: None

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB293, Posted 3/3/97
Executive Action: HB156, HB154

HEARING ON HB293

Sponsor: REP. SCOTT ORR, HD 82, LIBBY

Proponents: Mark Simonich, Director, Dept. of Environmental
Quality, (DEQ)
Tom Ebzery, Exxon
Don Allen, Mt. Wood Products Association
Riley Johnson, National Federation of Independent
Business, (NFIB)
Frank Crowley, Helena Attorney
Larry Brown, No. Oil and Gas Assn., Ag Preservation
Association
Steve Pilcher, Western Environmental Trade Assn.

Charles Brooks, Billings Chamber of Commerce
 Dexter Busby, Montana Refinery, Great Falls
 Gail Abercrombie, Mt. Petroleum Association
 Mike Murphy, Mt. Water Resources Association
 Steve Turkiewicz, Mt. Auto Dealers Association

Opponents: Peter Funk, Trout Unlimited
 Beth Baker, Dept. of Justice
 Anne Hedges, Mt. Environmental Information Center
 Richard Parks, Northern Plains Resource Council
 Debby Smith, Sierra Club
 Robert Brohough, Carriage Trade Cleaners
 Vern Bertelsen, Citizen
 Anthony Mele, Citizen
 Vicki Watson, University of Montana, Citizen
 John Krutar, Orvando Rancher
 Janet Ellis, Mt. Audubon
 Scott Kulbeck, Mt. Farm Bureau Federation
 Jim Emerson, Helena
 John Smart, Helena
 Geoffrey Smith, Clark Fork-Pend oreille Coalition
 Brett Browncombe, Mt. Wildlife Federation
 Cesar Hernandez, Cabinet Resource Group
 Brad Martin, Citizen and Mt. Democratic Party
 Beverly Fox, Helena

Informational Witness: Eric Finke, Helena Office, EPA

Opening Statement by Sponsor:

REP. SCOTT ORR, HD 82, LIBBY said HB293, the Environmental Audit Bill, was before the Committee last session but did not go through. During the interim, it was worked on by a working group, however, he said a consensus on the bill was not reached. He said the bill before you is the re-write of last session's bill from the work group's input. He went quickly through the highlights of the bill.

Page 1. Line 25, gave a definition of an "environmental audit."
 Line 30, privilege was no longer part of the bill, but immunity still is.

Page 2. Lines 7-12, stated the conditions for immunity.
 Line 13, New Section 5. A report is required and is public information.
 Line 28, if the information is wanted it was subject to discovery but there is still an avenue to get that information through the court system.

Page 3. Line 9, New Section 6, means if any of these things are violated, then you no longer have your immunity.
 Line 11, (a) if you purposely committed a violation,
 Line 13, if you repeatedly violated a environmental law,
 Line 16, if you haven't corrected it by the schedule.

REP. ORR distributed a handout, Voluntary Environmental Audit-Fact Sheet, attached as (EXHIBIT 1).

Proponents' Testimony:

Mark Simonich, Director, Dept. of Environmental Quality, (DEQ), stated he was there in behalf of Governor Marc Racicot. He handed out his written testimony, attached as (EXHIBIT 2). Director Simonich presented an amendment striking "Requires," and inserting "includes" on Page 2, line 16. (EXHIBIT 3).

Tom Ebzery, Attorney for Exxon Company, USA, stated he was a member of the working group and presented his written testimony, attached as (EXHIBIT 4).

Don Allen, Mt. Wood Products Association, stated he was also a part of the working group. He believed the more important part of the bill was Section 2, which stated the key words on line 15, "nothing in [sections 3 through 6] is intended to inhibit or be a substitute for the exercise of the regulatory authority by those agencies entrusted with protecting Montana's environment." In a nutshell, he said, if the true purpose of all environmental regulation in the state was to seek a cleaner environment, this was one way to get there. He believed that the voluntary best management practices were successful and it was better to work cooperatively versus the policeman type of approach. In view of what has done to date, as far as trying to get this bill in place, would not oppose the amendments. Mr. Allen also wanted to mention two other people that supported this bill: Rex Manuel, Cenex; and Pam Langley, Mt. Agriculture Business Association.

Riley Johnson, National Federation of Independent Business, viewed that an environmental self audit was a matter of trust, and that government should help the citizenry to accomplish the social good and not to seek out and destroy its citizenry in regards to business and economics. They also saw government as the leader for accomplishing the social goods determined by the Legislature and not the heavy handed enforcer. Mr. Johnson emphasized that it was not a big business issue. He gave some statistics of the poll their organization gave in 1989 to their members. They asked their members if they were affected by environmental laws and regulations, and asked if they would be in favor of self-audits? It revealed that 71 percent were not effected in 1989, and only 32 percent were interested in self-audits. They asked the same question in 1997 and 19 percent said they were not effected, and 82 percent were in favor of self-audits. They felt it was a dramatic turn and the census revealed that the members would sooner or later be affected by environmental issues. He closed in asking the Committee to allow self-audits, and let them take care of their own problems.

Frank Crowley, Attorney in Helena, passed out two handouts, a copy of the Toxic Release Inventory Reporting Form R and Instructions, and federal regulations (EXHIBIT 5), printed by the Bureau of National Affairs. He said these federal regulations

were incorporated by references into Montana state regulations. Mr. Crowley commented that if one quickly scanned these regulations, and reviewed the complexity and the detail, it would reveal what the day to day environmental management people had to deal with by having an industrial facility. He said he had been involved with environmental regulations for a number of years and there were many reasons to support HB293. He wanted to focus on one area of criticism. Much of the opposition had referred to the bill as a "free ticket out of jail." He said if you take a pragmatic approach to environmental compliance in the state and consider the fact that the old days of the philosophical battles are long past. He stated, "it is now a question of how are we going to comply, not whether we have to comply."

Larry Brown, Northern Oil and Gas Association, and the Ag Preservation Association, stated that from an agricultural perspective, environmental audits have some affect on them especially with dairies and feedlots. The oil and gas industry have interests in this bill from situations such as oil spills, reclamation of drill sites, etc. He said he worked for an environmental firm during the off season of the session, and he felt the standards that they had to abide by to conduct these environmental audits are somewhat overwhelming. The ASTM standards are widespread as format for how those reports are reported. In order to conduct these type of audits, they are generally evaluated and certified by a certain body of environmental professionals. The liability is also incredible. In doing these audits for a few thousand dollars, one may discover a million dollars worth of environmental problems. The issue then becomes the risk of environmental non-compliance at the risk of public health and safety. He thought public health and safety issues were the utmost important. He also wanted to mention a program that was being considered in industry called Risk Based Corrective Action Program. He explained if there is a environmental risk that may effect public health and safety, then you take the appropriate level for disclosure, and put it into action to correct it. He finished in saying this bill is a start to provide an incentive to conduct environmental auditing. He hoped the bill didn't go too far to scare the small operator off.

Steve Pilcher, Western Environmental Trade Association, (WETA), stated that our regulatory programs are intended to protect our environmental resources. Our regulatory programs are only successful if compliance is achieved. Therefore, anything that we can do to enhance compliance is going to be beneficial. He said that HB293 provides the necessary and important encouragement of industry to voluntarily make timely modifications. By doing so, not only is compliance achieved, but the environment is protected. He added that nothing in this bill prevents the Dept. of Environmental Quality to conduct necessary compliance inspections on their own or appropriate enforcement actions.

Charles Brooks, Billings Chamber of Commerce and the Montana Chamber of Commerce, felt that this was a very wise approach to the problem and that there were enough safeguards in the bill. He urged the committee to pass this bill.

Dexter Busby, Montana Refinery, Great Falls, supported HB293 and believed the concept of self-audits was the right thing to do.

Gail Abercrombie, Executive Director of the Montana Petroleum Association, wished to commend the Committee and the people that continued to work on this particular piece of legislation. She said it was a long hard battle and it took a lot of perseverance. She emphasized that HB293 did not diminish any of the existing regulatory programs. This bill gives businesses an ability to examine and find out where they are at in terms of compliance with environmental regulations.

Mike Murphy, Montana Water Resources Association, believed this legislation was reasonable and promoted environmental protection.

Steve Turkowitz, Montana Auto Dealers Association, supported HB293.

{Tape: 1; Side: A; Approx. Time Count: 3:40; Comments: None.}

Opponents' Testimony:

Peter Funk, Montana Chapter of Trout Unlimited, stated the 2000 members of his organization opposed this bill. He said they saw some problems with the bill such as the timing of the reports, criminal immunity, and the public's access to the audit information. Section 6 of the bill, he believed was designed to take out many serious environmental violations. It appeared to them that the thrust of the bill was to deal with the more "minor" violations.

He referred to the top of Page 2, where it says, these violations needed to be reported to the Dept. of Environmental Quality within 30 days of their occurrence. He asked the Committee, who is it, under this bill, that determines if the exceptions apply. He posed an incident which resulted in substantial damage to human health. This bill does not require a report of that incident for 30 days to DEQ. That said to him someone other than our state regulatory agency makes the decision about whether these exceptions apply or not. He strongly felt that there should be a shorter time frame for reporting than the 30 days. He said there were other national bills of this type which required reporting within ten days and felt that this shorter time frame would help assure that the agencies make the decisions.

The second area he commented on was that of criminal immunity. He said the language prohibits the Dept. of Justice from acting.

Again, Mr. Funk referred to Section 6 and believed that "knowingly" type violations were exempted from the bill. Mr. Funk said the majority of criminal violations require either purpose, knowledge or negligence. He suggested to the Committee that it was inappropriate to include criminal immunity on Page 2 of the bill.

The third point he raised was whether or not the audit information is public. He referred to the bottom of Page 2 where it said "the Dept. may not request an environmental audit..." He thought of this bill as a trade off, and the state is saying we will give you civil administrative and criminal immunity. His feeling was that the trade off in the bill ought to be public. It is important to recognize that it says repeated violations constitute an exemption from this process. If you are in a situation where a regulated entity has used the audit process in the past to disclose the violation and in the future there is a subsequent violation, which under this bill, takes it out of the audit process. He strongly felt that there should be access to the audit information especially with entities with repeated violations. The last sentence says the audit information may not be used against the regulated entity in any administrative hearing or judicial action. He asked the Committee to think about the repeat violations, and if that was a good idea.

Mr. Funk distributed some amendments to HB293 for the Committee to consider, (EXHIBIT 6). He explained them briefly. The first two amendments simply deleted the language dealing with criminal immunity and left the bill as it was with regard to administrative or civil penalties.

The third amendment dealt with the compliance schedule and struck "negotiated between the Department and the regulated entity."

Amendment No. 3 simply says the compliance schedule "will be written by the department."

Amendment No. 4 dealt with Line 10 of Page 2, where it talked about the regulated entity cooperating with the Department and providing information that is necessary to the implementation of Sections 1-6. The amendment he proposed inserted, "all information that the department deems necessary to determine the extent of the violation and the potential harm caused by the violation."

Amendment No. 5 dealt with the extent to which the audit information is public and suggested that where it says "but the department may not request an environmental audit," and inserted "The department may request the environmental audit report if it is necessary to determine the nature and extent of the violation."

Mr. Funk added that the vote in the House on this particular bill this session was 60 to 40. It was not 90 something to a single digit number as was stated. He didn't believe that this bill could be characterized as having massive and overwhelming support.

Beth Baker, Dept. of Justice, said they are not primarily responsible for the enforcement of the environmental laws in Montana. A copy of her written testimony is attached as **(EXHIBIT 7)**. She handed out copies of the amendments she had prepared, **(EXHIBIT 7A)**, and a letter dated February 21, 1997, concerning EPA's "Statement of Principles-Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs," **(EXHIBIT 8)**. She called attention to HB102, which revises the sentencing and correctional policies of the State of Montana and one of the principles that was incorporated in that bill states that sentencing correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions. They believe that the criminal immunity provisions in this bill were inconsistent with that policy and should not be there.

{Tape: 1; Side: B; Approx. Time Count: 3:50; Comments: Turned Tape.}

Anne Hedges, Montana Environmental Information Center, said she was part of the working group and wanted to discuss some of the points that were not agreed upon. She said that they could reach agreement on the fact that industries should audit and small businesses should audit. She believed it is a beneficial practice. One of the things they could not decide on was whether we should go with the education. One of the reasons, people don't audit is because they don't know what an audit is or how to go about it. They believe the emphasis in this arena should be on educating companies on how to go about it. MEIC supports penalty mitigation but opposes blanket immunity. MEIC could support this bill if there were a few amendments to it.

Ms. Hedges spoke about what was going on at the national level regarding environmental audit policies in states. EPA came out with a memo on February 14, 1997, attached as **(EXHIBIT 9A)**, which **Ms. Baker** has also passed out. She referred to Page 2 of the document, which discusses the authority that states need to maintain, if they are going to be delegated programs by EPA. She read from the document, "In determining whether to authorize or approve a program or program modification in a state with an audit immunity law, EPA must consider whether the state's enforcement authority meets federal program requirements." She said the document then went through the components that EPA will be looking for. **Ms. Hedges** believed that some of those components which are missing from the bill were intentionally excluded and needed to be put in the bill in order to make it satisfactory with EPA and the public interest community.

Ms. Hedges referred to Page 2 (2i), significant economic benefit, and explained what that meant. She said when a company is penalized for a violation, there is a punitive side of that penalty, and also an economic benefit side of it. The economic benefit side intends to level the playing field for all the

parties that are engaged in that business so that the party who was not in compliance does not gain an economic advantage over its competitors. She said, "it should not pay to pollute, and if the state can not collect that economic benefit, then it will pay to pollute."

Ms. Hedges referred to (EXHIBIT 9B), an Office Memorandum from Mark Simonich, the Director of the Dept. of Environment Quality, dated November 7, 1996. This was in response to the Self Audit Workgroup. The memo said is that the state needs to have the ability to recover some part of the penalty including the economic benefit for violations. She was disappointed that the Dept. did an about-face on this component.

Ms. Hedges referred to Page 2 again of (EXHIBIT 9A), and said the Dept. needs to be able to have the ability to get civil penalties for repeat violations, for serious harm, and for activities that may present imminent and substantial endangerment. She noted that imminent is not in this bill and needs to be included. The Dept. needs to be able to obtain fines and sanctions for willful and knowing violations and for gross negligence.

Ms. Hedges referred to (EXHIBIT 9E), a memo to her from the EPA listing the programs which have not yet been delegated to MT. She said these programs could be jeopardized if EPA believes the state will not have the enforcement authority it needs. She noted the EPA states this in the memo. She noted that there were five states that have audit laws that resulted in environmental groups and public interest groups petitioning EPA to revoke their primacy, which include: Colorado, Ohio, Texas, and possibly Wyoming. MEIC believes that this law will seriously jeopardize Montana's ability to enforce our programs.

Ms. Hedges included in her packet some amendments for HB293, attached as (EXHIBIT 9C), which she felt would take care of some of the concerns. She pointed out that there was no provision in the bill when an entity that has violated the law, to remediate harm. She said there needs to be a provision in this bill that allows that entity to remediate any harm as a result of that violation. In her packet, there was also a copy of a newspaper article, dated March 10, 1997 from a Bozeman paper, attached as (EXHIBIT 9D).

Richard Parks, Northern Plains Resource Council, (NPRC), handed out copies of his written testimony opposing HB293, attached as (EXHIBIT 10). He also distributed amendments suggested by NPRC, attached as (EXHIBIT 11).

Debby Smith, Montana Chapter of the Sierra Club, stated they oppose HB293. She said there was parts in the bill that they could commend and supported the basic idea of voluntary compliance with the environmental laws. She made a point saying that voluntary compliance with any law does not always work, and that is why there are provisions in the law to punish those that

do not comply. She supported the amendments that the previous opponents had stated concerning removing criminal immunity. In addition **Ms. Smith** suggested as an amendment, to delete the sentence, line 28 of Page 2 through line 1 of Page 3, of Section 5, that says the Dept. can't use any information of the environmental audit in any proceeding. **Ms. Smith** said the main flaw of the original bill was that you don't want things being secret especially in court. She also suggested that an amendment be included concerning meaningful deadlines. She said on Page 2 in Section 4, Lines 6 through 11, did not have any definite deadlines. The Legislature needs to give some direction in subsections 1,2, and 3. She urged the Committee to oppose the bill as written and to amend it as she suggested. She added, why not be tough on crime and why treat these corporate offenders any different that we would treat an individual criminal. Don't subject our government to criticism by the public by setting up a special categories for so-called corporate polluters.

Robert Brohaugh, Carriage Trade Cleaners, Great Falls, distributed his written testimony, attached as **(EXHIBIT 12)**.

Vern Bertelsen, Citizen, stated he had read this piece of legislation and feared that this is opening doors for very serious problems. He said environmental degradation can be something that will last forever, and we should not take any chances to give anybody an opportunity to pollute and then escape the penalties.

Anthony Mele, Citizen, opposed HB293. He said if this bill was based on the premise, regulation doesn't work as well as enticement, he asked, how much enticement then is necessary. He commented that it should be enough enticement to know that if you acted responsibly, and the community would continue to support you. The bill effectively said to him that we need to exempt industry from direct responsibility. He did not oppose incentives but he did oppose immunity from prosecution just because they admit their guilt. He also felt this bill would shield industry from public scrutiny that is so necessary. He believed that HB293 would create two standards of accountability. For example, if he broke the law, regardless of his intent, all his actions are a matter of public record and he must answer for them. His incentives for avoiding this scenario are many and not a single one of them include a system by which he could hide his act and remedy the situation. He said there was nothing in our history of this state that gives us any reason to believe that secret self regulation will improve environmental quality. He made the analogy of giving candy to children to get them to do what you want them to do. He said at some point in time you have to draw the line and put your foot down. He asked what action do children most respect? He concluded in saying HB293 is a giant piece of candy.

{Tape: 1; Side: B; Approx. Time Count: 4:15; Comments: None.}

Dr. Vicki Watson, Professor, University of Montana, stated that she spoke in behalf of herself and she opposed HB293. She distributed her written testimony attached as **(EXHIBIT 13)**.

John Krutar, Ovando Rancher, recommended that the Committee table this bill or take a careful look at the proposed amendments. He thought this bill would make it very easy for entities to pollute our rivers.

Tara Pele, Montana Public Interest Research Group, (Mont PIRG), said they were a consumer and good government advocacy group and opposed this bill because it is not only a bad environmental policy, but also it is a bad government policy. She urged the Committee, if they found it necessary to pass this bill, that it should be done only on a trial basis.

Janet Ellis, Montana Audubon, submitted her written testimony, **(EXHIBIT 14A)**, her proposed amendments, **(EXHIBIT 14B)**, a copy of Title 75, **(EXHIBIT 14C)**, and how HB293 applies to Agriculture, Title 80, **(EXHIBIT 14D)**.

Scott Kulbeck, Montana Farm Bureau Federation, supported the concept of self auditing for voluntarily identifying environmental violations, but they were opposed to HB293 as written.

Jim Emerson, Helena, opposed HB293 as it was written. He added that the people that put forward this bill asked to be trusted, but they have not shown us any reason to trust them in the past. He gave an example of Montana Rail Link where they have not taken care of their past actions.

John Smart, Helena Citizen, wanted to remind the Committee that the most recent example we have of self audits being total failures is the destruction of the Little Rockies by Pegasus Gold Company.

Geoffrey Smith, Clark Fork-Pend Oreille Coalition, stated his organization is a group of various people dedicated to protecting and restoring water quality throughout the Clark Fork River Basin and opposed HB293. He distributed his written testimony, attached as **(EXHIBIT 15)**.

Brett Brownscombe, Montana Wildlife Federation, stated their opposition to HB293 lied in the polluter protection provisions contained in the bill. He passed out his written testimony, attached as **(EXHIBIT 16)**.

Brad Martin, Montana Democratic Party, stated they were in opposition to HB293 in its current form and believed it does not accomplish what is important, which is protecting the health and welfare of the citizens of this state.

{Tape: 2; Side: A; Approx. Time Count: 4:35; Comments: Start of Tape 2.}

Cesar Hernandez, Coordinator of The Cabinet Resource Group, Noxon, opposed HB293 and submitted a copy of his written testimony, attached as (EXHIBIT 17).

Beverly Fox, Helena, opposed this bill. She wanted to comment on why people stay away from the polls was because they know their voices are no longer being heard. The voices that are being heard are those from big corporations.

Questions From the Committee:

SEN. WILLIAM CRISMORE asked Director Simonich to respond to Anne Hedge's concern she mentioned with economic benefit.

Director Simonich explained that he participated with the Environmental Quality Council to try to come up with some recommendations concerning language for the bill. He said the discussion entailed all the various pieces of input for consideration. He said that discussion was one of the reasons the Dept. laid off the need for economic benefit or consideration of economic benefit. He said now, without the self audit bill in place, there are many times when the Dept. takes enforcement actions against private entities, that economic benefit is looked at very strongly to determine whether the Dept. thinks economic benefit is a necessary component of any penalty that would be assessed. He said in many cases, working with the parties, they both try to correct the situation on the ground and clean it up. He felt the environment gained more that way than simply collecting the economic benefit. He reiterated that the Dept. doesn't push collecting the economic benefit currently without the audit bill being in place.

SEN. CRISMORE asked Director Simonich if he felt EPA would take away primacy if this bill passed.

Director Simonich said that Mr. Wardell of EPA has not indicated to him that the passage of this bill would directly cause EPA to take back primacy. The letter from EPA did say that this would caution them to look very cautiously at future programs that the Dept. might submit for primacy. He said EPA would not take any stand on whether or not the passage of the bill would cause them to withdraw primacy on any of the state's programs.

SEN. VAN VALKENBURG commented to REP. ORR that the significant opposition to the bill revolved around granting criminal immunity. The bill itself prohibits the granting of criminal immunity when a violation has been committed by the person purposely and knowingly. Essentially, it needs only one other amended statement and that is negligently. Under criminal law,

that has to be gross negligence in order for that to be established. **SEN. VAN VALKENBURG** asked **REP. ORR** if they really needed to grant criminal immunity in this bill to accomplish your goals.

REP. ORR responded that yes they did. But he said there has been very few criminal violations. He said he doubted that anyone would use this vehicle to stand behind. He said if they did, the end result is going to be that we get the environment cleaned up, because they have to enter into a negotiation agreement to clean up the site. The bottom line is that maybe once in the next 20 or 30 years, we would have somebody actually get immunity. He thought that was a fairly good tradeoff for all of the other things that the state would get cleaned up in the meantime.

SEN. VAN VALKENBURG commented that it apparently would not be a sufficient enough tradeoff to eliminate that opposition to the bill concerning criminal immunity. He said if that was deleted, the only thing that is being affected is gross negligence. He asked **REP. ORR** if they could give any ground on this part of the bill. **REP. ORR** answered no.

SEN. VAN VALKENBURG asked **Charles Brooks, Billings Chamber of Commerce**, about small business people in the State of Montana, since he was the only one left in the hearing room that could represent small business. He commented that **Mr. Brohough**, who is a small business owner in the dry cleaning business in Great Falls, that testified for the opponents, basically said that essentially the passage of this bill would give his competitors an economic advantage because in essence, he made the investment in environmental clean up and/or possible new technology, while his competitors have not. He asked from the perspective of other small business people, if that doesn't hold true that we are giving a significant economic competitive advantage to people that have not done anything for compliance and break the law. **SEN. VAN VALKENBURG** suggested that possibly something should be put in this bill that requires the Dept. to assess a economic penalty, if there is a substantial economic benefit.

Mr. Brooks replied that the small business person is most likely to discover something he didn't know about, not something he did knowingly.

SEN. VAN VALKENBURG said his question to him was so what if he discovers it, but he turns out to have obtained a significant economic competitive advantage. Shouldn't we be looking at assessing something to level the playing field.

Mr. Brooks said he did not see that as an economic advantage.

SEN. TAYLOR asked the sponsor about the states that passed environmental self audit laws, and if they were exactly as this bill is written. **REP. ORR** said he did not have the list of

states that have self audit laws but he knew that South Dakota, Idaho, and possibly Wyoming. He said it varied.

SEN. TAYLOR wondered if any of those states have given up criminal immunity. **REP. ORR** answered some have and there were various combinations.

SEN. TAYLOR asked what incentive do small businesses have to follow environmental laws. **REP. ORR** said the motive of this bill is to provide a tool for people that want to find out what their environmental problems are today and not leave the problem for their children or someone else in the future. This way they can find out how to clean up the problem without the fear of going to jail.

SEN. BEA MCCARTHY asked **Director Simonich** if he had time to review **Beth Baker's** amendments and if so asked him to comment on them. He said the Dept. has looked at those amendments and said the Dept. thinks some of the amendments were appropriate. **Director Simonich** explained the way the Dept. viewed these audits. He said the audits would have to be periodic scheduled audits. He did not see this additional clarification really necessary. Regarding striking criminal immunity, he reiterated that the way the bill was written, still gave the Dept. an opportunity to take criminal prosecution. That was the reason the Dept. did not suggest that the bill needed that added. He added there is not a very good track record in the state in trying to pursue criminal environmental enforcement cases through the courts. The courts have a particularly high burden and the state simply is not being real successful in that area.

SEN. MCCARTHY asked **Director Simonich** if he had reviewed **Mr. Funk's** amendments of Trout Unlimited. He answered they were offered in the House but he could not comment on them at this time because he did not have the specific amendments at hand.

{Tape: 2; Side: A; Approx. Time Count: 5:00; Comments: None.}

SEN. VIVIAN BROOKE asked **Director Simonich** about what he said concerning some type of requirement by the Dept. to do scheduled periodic environmental audits.

Director Simonich said the definition of the self audit indicates that it has to be periodic or that the company has to put together a regular program for scheduled periodic audits.

SEN. BROOKE commented that there was not time frame mentioned and had questions about the procedures undergone on an audit. She wondered if the Dept. could implement stricter periodic audits than intended.

Director Simonich replied the word, "periodic" was specifically in the bill. He said the Dept. can't require stricter periodic

audits simply because the audits are not required in the first place.

SEN. BROOKE asked **Larry Brown, Northern Mt. Oil and Gas**, what organization he represented and if he could comment on the controversial problems with the Yellowstone Pipeline. He said he represented Northern Mt. Oil and Gas Association, and said he did not know any specifics on that issue. He offered to comment on the standards and procedures involved in an environmental audit. **Mr. Brown** explained that the standards are structured very carefully and have to be certified by the ASTM (American Standards and Testing Materials) standards.

SEN. BROOKE asked **Tom Ebzery, Exxon** if this bill passed what would be different concerning the environmental outcome for example in the Yellowstone Pipeline, which resulted in leaks and spills.

Mr. Ebzery said without knowing the specifics of that project, it appeared to him that it would of been reported and a compliance schedule would of been worked out with the Dept. to clean up the contamination.

SEN. BROOKE asked if the entity who is regulated has to make the discovery or can other entities make the discovery. **Mr. Ebzery** said he thought that the regulated entity or a contractor under that entity would be the ones to conduct the audit.

SEN. MCCARTHY stated to **Director Simonich** that there was no fiscal note with this bill which leads her to believe that your not going to need any further auditors or extra personnel.

Director Simonich replied that this audit will be done by the business or agent that they hire. It does not require the Dept. to perform those audits, therefore the Dept. did not see a large fiscal impact. He said it would be their role to respond to whatever violation that was brought to the Dept.

SEN. VAN VALKENBURG said to **Vicki Watson** that it sounded like **Mr. Simonich** had a different interpretation of what **Mr. Wardell of EPA**, had said than you have. Could you respond to the context of **Director Simonich** answer concerning primacy. What risks are there to continue primacy over these environmental laws that the federal government has either given authority to the State of Montana to enforce or could in the future give authority to the state to enforce.

Ms. Watson said the copy said Jan, 30, and we have had information since that date. She said this particular letter seemed to her, made a very strong statement. Their conclusion is based on these concerns listed, and all those concerns are still in the bill. It says HB293 in its current form, will prevent the delegation of environmental programs to the department. **Ms. Watson** said perhaps, there has been some clarification since the

letter was written or a backing off of how strong EPA's statement sounds.

CHAIRMAN GROSFIELD asked the question to be referred to **Eric Finke, EPA**.

Eric Finke, EPA, Helena, responded to the question about delegation. The letter was written by **Mr. Wardell** did state that as the bill was written, and the bill is not much different now, will probably have some significant impact on the delegation of programs in the State of Montana.

SEN. VAN VALKENBURG asked **Mr. Finke** if it would affect the continued enforcement of federal programs that have already been delegated to the state.

Mr. Finke said that was difficult to answer because a replication of programs is something the EPA does not want to do. He said EPA has been petitioned in five states to withdraw the programs. He said the first hearing comes up in Texas, and that information from that case will substantially have an effect on determining which way EPA goes.

SEN. VAN VALKENBURG commented to **Director Simonich** that EPA sounds quite serious, which is quite a bit different from what he characterized the position of EPA. He asked the Director to respond to this.

Director Simonich retorted that he did not think he characterized it any differently than what **Mr. Finke** just did. He said **Mr. Finke** just told you that in the letter that **Mr. Wardell** sent to **Rep. Knox**, that the EPA had indicated concern for various portions of this bill, and they were not sure whether it meant that the Dept. was fully meeting the requirements under federal law. However, **Director Simonich** said as he had looked at the letter, and looked at the way it's applied, he disagreed with that. He said one of the questions is whether or not the Dept. had to put public access to information. He felt Montana provides more access to information than the federal government generally did. What he really said was that those concerns of this bill will cause the EPA to really question further delegation. Delegation for further programs. He also said that he could not give you a definitive answer whether EPA would withdraw primacy to programs currently delegated to the state, and in fact, EPA really doesn't like to do that. **Director Simonich** said that very much reflects what he indicated to this Committee earlier.

SEN. TAYLOR asked the sponsor **REP. ORR** if this bill would create jobs. **REP. ORR** replied that it very well could. He commented it would keep the money flowing in the respect that the money would not be going to fines.

CHAIRMAN GROSFIELD asked **Mr. Ebzery** when does the time line trigger regarding reporting information. He added it may take from two days to two weeks to complete an audit, and you have to disclose the information in writing within 30 days after the violation has been determined to exist. **Mr. Ebzery** said the some states are allowing 60 days and some are just allowing 10 days. The discussion have been in the past that these audits sometimes take four to six weeks. They felt that 60 days was a reasonable period of time for a larger operation and it was compromised at 30 days.

CHAIRMAN GROSFIELD asked **Director Simonich** what kinds of rules would he foresee that would require specific periodic stipulations on the audit and still fit onto this statute. He added that this bill says that it can not be subject to any rule or law.

{Tape: 2; Side: B; Approx. Time Count: 5:30; Comments: Start of Side B.}

Director Simonich replied the Dept. is not going to require audits be done but it says the entities have to cooperate with the Dept. He said the cooperation is done by working with the company and determining how good the audits are or how they are intending to do the audits. This is done to get a clearer picture of the situation.

CHAIRMAN GROSFIELD asked **REP. ORR** to explain what kind of rulemaking you expect.

REP. ORR said he talked to someone from the MSU Extension Service, and they have been working on a brochure that lists different kinds of audits, which includes environmental audits. An idea has been brought up about folding the aspects of this bill into that brochure. It would be laid out so a business would know just exactly the steps to take. He added that there are provisions in there for it to be a periodic audit. Since it is a voluntary approach he felt that strict rules were needed and that was the best way.

CHAIRMAN GROSFIELD said this applies to Title 75 and Title 80, why did you not apply it to mining or oil and gas.

REP. ORR said that those entities are highly regulated entities, and they have current programs for remediation. This is more directed at small businesses, and some large businesses that want to participate.

SEN. MCCARTHY asked **Mr. Finke, EPA**, if your department prosecuted anyone for criminal violations in this particular area. He answered he did not know.

SEN. MCCARTHY commented if she understood what he had said previously, he was in favor of the amendments from **Beth Baker**, which changes from criminal to civil because of your department's current policy.

Mr. Finke hesitated to take a position one way or the other. He said if they removed criminal immunity from this bill, he would feel better about this bill.

CHAIRMAN GROSFIELD reminded everyone that **Mr. Finke** appeared here as a informational witness of a federal agency, and not as a proponent or opponent.

CHAIRMAN GROSFIELD asked **REP. ORR** to close and speak about how you see environmental audits by big business and by small business coming forth. He also asked him to comment on the outcome of environmental clean-up with and without this bill.

REP. ORR closed in saying that the advantage big business currently has is that they have big attorneys and can hide information anyway. Small businesses do not have that avenue open to them because of their monetary limitations. He said the impetus of this bill is to give the small business entities an incentive to come forward and clean up the environment. He said that **CHAIRMAN GROSFIELD** hit the nail on the head when he mentioned previously the misunderstanding of this bill. He didn't think the bill was as bad as the opponents do. He thought of this bill as a step forward in environmental law. In the 60's and 70's we used the heavy hand of enforcement to get compliance with environmental law. Now, we are talking about a new way - that of cooperation and one that is result oriented. He hoped that both sides will see that point, and see that cooperation, which is a big part of this bill, will be a reality.

REP. ORR said at least 30 amendments have been offered in subcommittee, and more amendments in committee hearings and during executive action, along with more amendments offered on the floor of the House. He urged the Committee to resist all but the one which was offered by the Department. He then went through the amendments.

Page 2, at the top, **Mr. Funk of Trout Unlimited**, where he said it must be reported within 30 days of the occurrence. He said that was not the intent of the bill at all. It's the point the businesses are doing the environmental audit- spotting the problem. If it exists, then the entity has 30 days to notify the Dept. and then negotiate the compliance schedule to get the problem cleaned up.

REP. ORR commented on criminal immunity. He reiterated that there was only a few times that criminal situations came up. He did not think that we are ever going to meet that problem of someone who is criminally violating the law being able to hide

behind this, because if one goes to Section 6, it says the act does not apply.

REP. ORR said significant economic benefit was currently part of state and federal law and for good reason. He gave an example of two dry cleaners in a town where one is taking the cleaning solution and dumping it into a pit out back, and the other one is going ahead and recycling it and doing what they should, which costs more. Obviously, that dry cleaner which is violating the law, does have an economic benefit, because it is costing him less to do the job. He said what would happen if that illegal dry cleaners then decided to do an environmental audit and try to rid themselves of this liability. The outcome of that negotiated compliance schedule, would find that they knowingly and purposely, violated the law, so therefore, Section 6 would not apply.

REP. ORR commented on Section 6, Line 21 where it talked about after the effective date of this act due to federal law, prohibits the use of Sections 1-6 for obtaining primacy over federally delegated programs. He said why that statement is in there is because we don't want the EPA to just adopt the rule that says all the states that have gone through this process of adopting the self audit law, to just throw it out and respond, that's the rule. We want EPA to go through the process of holding formal public hearings and show why they want to do it. If after a hearing, they make that determination, then it would be acceptable.

REP. ORR commented on the candy example of the enticement issue. He said with children, we want to teach them honesty and have the children tell their parents when they do something wrong. If a child came forth and told their parents that they did do something wrong, most likely the parents would not spank them. They would thank the children for telling them and make the children know coming forward voluntarily is the right thing to do. He said that was one of the reasons this bill is before you was because of what precipitated in Colorado. An entity came forward to the state and said they have been violating an air quality emission law and wanted to fix it. They asked the state what do we do. The Dept. then lined out what to do and then they fined them a million dollars. He said that was the kind of heavy handed enforcement that we are trying to get away from.

He closed in saying thank you for a good hearing and appreciated everyone's patience.

CHAIRMAN GROSFIELD closed the hearing on HB293.

{Tape: 2; Side: B; Approx. Time Count: 5:40; Comments: None.}

EXECUTIVE ACTION ON HB154

MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By CHAIRMAN LORENTS GROSFIELD, on April 2, 1997,
at 5:05 p.m., in Room 405.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: None

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: None.
Executive Action: HB 483, HB 293

EXECUTIVE ACTION ON HB 483

Amendments: SEN. FRED VAN VALKENBURG asked CHAIRMAN LORENTS GROSFIELD if he had discussed the amendment with the House and was told he had visited with the sponsor of the bill as well as the sponsor of the amendment, and his sense from both was there would not be a "war with the House" if the amendment passed. He said HB 483 was an important bill and should be passed in some fashion; his sense was the worst that could happen would be it would go to a Conference Committee.

SEN. VAN VALKENBURG asked if the amendment would be different from what was offered last week. CHAIRMAN GROSFIELD referred to #5 of Amendments hb048304.alm (EXHIBIT 1) and said it was slightly different.

Motion/Vote: SEN. WILLIAM CRISMORE MOVED DO PASS ON AMENDMENT hb048304.alm. Motion CARRIED UNANIMOUSLY 8-0.

Motion: SEN. WILLIAM CRISMORE MOVED HB 483 AS AMENDED BE CONCURRED IN.

Discussion: SEN. VAN VALKENBURG said it was his expectation, based on the amendment which was just adopted, the Department of Natural Resources (DNRC) was going to be contracting out the technical assistance issue to the extent required in the amendment; there was a significant likelihood a successful bidder on the contract for the RFP would be someone the small communities were comfortable with and who would be able to satisfy their needs, regardless of who the contractor was. He stressed he was not saying who the contractor should be, but the communities were in a position of getting someone they were comfortable with.

CHAIRMAN LORENTS GROSFIELD said he didn't think they were presupposing there would be one contract statewide because the Department of Environmental Quality (DEQ) had the ability to choose the contractor(s) to develop the work plan. He said the function of this Committee was advisory in its capacity; however, there had been concern the local entities would be considered.

Vote: Motion HB 483 AS AMENDED BE CONCURRED IN CARRIED UNANIMOUSLY 8-0.

{Tape: 1; Side: A; Approx. Time Count: 5:20 p.m.}

DISCUSSION ON HB 293

Motion: SEN. FRED VAN VALKENBURG MOVED DO PASS ON AMENDMENTS hb029313.alm (EXHIBIT 2).

Discussion: SEN. VAN VALKENBURG said his amendments were intended to respond to the issues raised by Mr. Wardell regarding primacy. He said if there were going to be environmental self-audits, the State of Montana should be assured of retaining primacy over the enforcement of its laws which had been delegated to its enforcement by the Environmental Protection Agency (EPA); also, if there were additional appropriate future laws which would could be delegated to the state, ??? the state would have laws on the books which would comply with EPA enforcement policy. He then explained the Amendments in (EXHIBIT 2), and said they were somewhat culled in the expectation the Amendments hb029301.ate (EXHIBIT 3) from the Governor's Office would be adopted. He expressed support for both sets of amendments, explaining the Governor's dealt with some issues raised by EPA; however, neither he nor lobbyists of the environmental community thought they went far enough in dealing with some nuances of the EPA requirements. SEN. VAN VALKENBURG said environmental audits were a good thing and entities which were in violation should be encouraged to come forward and solve

the problems without significant fear of penalty; however, it had to be ensured that state primacy in the enforcement of the laws wasn't lost.

Larry Mitchell explained #3, #4, #5 & #6 of Amendments hb029313.alm were intended to mesh with the Governor's Amendments (**EXHIBIT 3**) #3, #4, #5 & #6. He said if it went as a stand-alone, he needed to do some cleanup editing on the Van Valkenburg (**EXHIBIT 2**) Amendments.

CHAIRMAN GROSFIELD asked if any of the amendments were exclusive or did they all mesh together. **Larry Mitchell** said they didn't conflict.

Anne Hedges, Montana Environmental Information Center, explained Amendments hb029313.alm (**EXHIBIT 2**) as follows: (#2) The first sentence precluded rolling audits; in other words, inspectors could not show up to say they had an ongoing audit which had a list of violations. There had to be both a beginning and an ending date and it had to be defined; also, it had to be an intentional activity on the part of the company. The second sentence meant when the audit was required, the law didn't apply; (#3) The violation disclosure time changed from 30 days to 15 days because if there was a problem or if damage could occur, 30 days could be too long. The Department had to be notified immediately; therefore, the burden of determination was on the Department. If the burden of determination was on the entity, the right call would not always be made; (#4) The Department should have the final say on the compliance and finalizing schedule; in other words, the bill didn't address the problem of what would happen if the two parties couldn't negotiate such a schedule; (#5) Currently, the bill required no remediation of the damage caused. The Department believed it had the authority under this, i.e. if it thought it had the authority, the bill might as well be specific. Remediation was important because the public should have the security and the Department should have the wording to guarantee remediation could be required of an entity if there was a problem; (#6) "Takes steps" wasn't quite strong enough; therefore, the insertion language; (#7) The Department couldn't access the information it needed; it was important for the Department to be able to get the information it needed through asking questions of the entity regarding the violation, damages, etc. Even though the Department said the bill already granted them that ability, the amendment clarified it for the public, the Department and the regulated entity; (#8) The Department could request certain information it thought necessary in order to get certain information to determine if there was a violation; therefore, it should have the ability to do so without having to go through the whole discovery process; (#9) The concern was for people or companies who were not acting in good faith; (#10) EPA concerns of that type of activities wouldn't fall under HB 293; (#11-#12) If a company continually repeated the violation law, there was a limit as to when the audit policy could no longer be used; in other words, it

tightened up the repeat violator language; (#13) This one conflicted with the Governor's because it (Governor's) took the bill back to the original language which meant nothing. The federal government would never say environmental audit was a problem for primacies; however, it would say what was done with the audit after being handed to the state could be a problem. The language clarified the primacy issue; (#14) Editing change; (#15) EPA language clarified how the law could not be misused, i.e. whistleblower who would tell on a person.

{Tape: 1; Side: A; Approx. Time Count: 5:40 p.m.}

John Wardell, Environmental Protection Agency (EPA), said they had not had a chance to look at the amendments or see how they inserted into the bill; however, what was presented cleared up some concerns which were raised in their letter, but he wanted the opportunity to review them case by case.

SEN. VIVIAN BROOKE referred to Amendment #2 of (EXHIBIT 2) and asked who was qualified to be an auditor. Larry Mitchell said it was someone who could be the owner or operator of the regulated entity itself and could do an internal assessment of his or her own facility to see whether there was any violation of environmental rules or permits; also, it could be done through a contracted service, i.e. consulting firms were brought in to assist. He said it was not really clearly defined, though it talked about an agent acting on his behalf.

SEN. BROOKE asked John Wardell the same question and was told they had no requirements; the entities could be either the company itself or a contracted service, which was used mostly by larger companies because they needed an independent party to look at it.

SEN. KEN MILLER asked about #12 of (EXHIBIT 2) and said a repeat of the last three years would indicate sort of a pattern. He wondered why language was needed which talked about a repeat in the last five years. SEN. FRED VAN VALKENBURG said one of the big differences was it didn't necessarily have to be at the same location with respect to the five-year issue because it talked about the pattern of a facility's parent organization; therefore, a parent organization could have sites all over the country, and there might not be the same regulations as here in Montana.

SEN. MILLER asked what a pattern would be -- same type of violation or any violation -- because some companies owned many operations and could have minute-types of things going on; however, it wouldn't necessarily mean a pattern or they weren't responsible. SEN. VAN VALKENBURG said a pattern was a significant number of similar violations which would be up to the Department of Environmental Quality (DEQ) to interpret and eventually write rules to define it, if need be.

CHAIRMAN LORENTS GROSFIELD referred to Amendments #11 & #12 and asked if they were from EPA's recommendations. **John Wardell** said the wording of the language was directly from the EPA policy.

CHAIRMAN GROSFIELD asked how many it took to be a pattern. **Mr. Wardell** said it wasn't defined because they wanted to allow some discretion to be left to EPA regional offices. He said a parent organization could apply to the same company in different states or several facilities owned by the same company in the same state. He said the variety of programs administered under the Clean Water Act could be looked at to determine if it was being impacted by a variety of violations over a number of years. **Mr. Wardell** stated the design to allow discretion troubled some people because it was left to the agency itself; however, three, five, seven or two was considered and some people felt the severity of the violation had to be looked at. He summarized by saying flexibility gave comfort to some folks but discomfort to others.

CHAIRMAN GROSFIELD asked about the pattern of federal, state or local violations and wondered whether the agencies said they had to be similar. **Mr. Wardell** said if one facility submitted a significant violation in each of several areas over a period of several years, his agency would have concern and they would respond in one fashion. However, if the violations were minor and occurred in a particular area, the agency would focus on that. He said one major concern of theirs was the impact on the environment and public health because it was one way to calculate penalties and seek redress.

{Tape: 1; Side: B; Approx. Time Count: 5:51 p.m.}

SEN. GROSFIELD suggested there were three primacy issues: (1) State had primacy in some areas; (2) State had primacy pending in some areas; (3) State had potential primacy in some areas. He said the letter from the EPA wasn't very specific as to which area it was talking about. **John Wardell** said the letter was specific in the area of future delegations and in conduct of the state's enforcement program; in other words, adoption of the bill would cause them to review their decisions in those areas and scrutinize carefully the conduct of the state's enforcement program. He referred to delegations already given the Department and said they were silent because they wanted to take a look at what ultimately came from the legislature. They wanted to decide the pros and cons of their ability to take back some of the programs, i.e. should the state be given any more delegation, and should state enforcement actions be used on the delegated programs. He said EPA would be more involved in the enforcement side of the delegated programs. He said in other states, EPA was asked to withdraw its primacy where the laws presently existed and it appeared EPA had an obligation to go through the process.

CHAIRMAN GROSFIELD asked if Region 8 experienced much use in environmental audits by people in the regulated community. **Mr.**

Wardell said they had because there was an environmental audit policy on the books which was specifically designed because EPA encouraged the use of self-audits. He said penalties had been mitigated and agreements reached in Region 8; therefore, it had done what it was designed to do, i.e. encouraged companies to do those sorts of things, take actions, uncover problems and allow companies to correct them, and forgive penalties. **Mr. Wardell** said it was their position when the company had reached an economic benefit, part of it should be repaid because the competition was then kept on a level playing field.

CHAIRMAN GROSFIELD asked what was meant by repayment. **John Wardell** said it was penalties; however, sometimes, instead of returning the money to the federal treasury, they allowed companies to develop supplemental and environmental projects in lieu of the penalties. He said the companies undertook those projects to do things they weren't otherwise required to do from a regulatory perspective; however, they did help protect the environment. He illustrated by saying ASARCO in East Helena bought the community a street sweeper instead of paying the penalty.

CHAIRMAN GROSFIELD asked **Jerome Anderson, Shell Western Exploration and Production**, to comment on the amendments. **Mr. Anderson** said he was an ad hoc representative of a group of people who supported this legislation in its original form, and to some extent, in its amended form. He said if the purpose of the bill was to encourage self audits, many of the amendments discouraged their use because the nature of the self-incriminatory provisions of some of the amendments would encourage him as an attorney to never recommend the pattern of self-audit to his clients. He said HB 293 was extremely important legislation to the industrial community, but he had not seen the amendments until now so it wasn't possible for them to tell the Committee what the ultimate effect of them would be. He referred to: (1) #2 of Amendments hb029313.alm (**EXHIBIT 2**) -- he didn't know what "discrete activity" meant but didn't think it was necessary; (2) #3 -- "immediately" was not defined and presented a difficult hurdle to people in the self-audit situation; there should be a specific time frame; (3) #4 -- prevented negotiation regarding the compliance report prepared by the Department. The purpose was not to prevent negotiation but to prevent a regulated entity from talking to the Department about what went into the compliance report. The Department didn't have to accept what the regulated entity had to say, but the entity should have the opportunity to say something to the Department about what went into the compliance report; (4) #7 -- required the regulated entity to incriminate itself, particularly because exemption from criminal action was removed from the bill; the entity performing the self-audit would be required to deliver everything on the table to the Department who would bring the criminal activity against it and it removed the Constitutional protection against self-incrimination.

Mr. Anderson said he was having trouble being amiable because someone was dictating to them what sort of legislation they would have. He said #12 & #13 gave the federal government, EPA, the total power to determine whether or not the statute would be used; he was of the opinion if primacy was going to be used, Montana had to back away from these amendments because they would give EPA authority to repeal the statute by giving notice to the Governor or someone reviewing primacy. He said the EPA was an independent entity and if the EPA wanted this to be handled by the federal government, it should send it to Congress for passage. **Mr. Anderson** said #15 wasn't needed in HB 293 and felt it was fair to say if the bill got doctored up so they were in a position of opening themselves up to extreme liability through the use of a self-audit program, that program would not be used in Montana.

CHAIRMAN GROSFIELD asked for comment on #5. **Mr. Anderson** said if harm was created by a violation, everybody would expect remediation to take place. He didn't know the definition of "promptly"; the Department now had the authority to require remediations so he didn't know why it had to be in the bill.

SEN. VIVIAN BROOKE commented "promptly" in #5 was already in the bill on Line 7, prior to the recommended amendment.

SEN. BEA MCCARTHY suggested, because of the enormity of the amendments and because the Committee had not had an adequate opportunity to review them, the action be deferred until Friday in order to let the parties involved at least go over them.

CHAIRMAN GROSFIELD agreed the amendments were very substantial and action may have to be postponed; however, there could be a deadline problem because it had to be read over the rostrum by Friday.

SEN. FRED VAN VALKENBURG commented the Committee was given amendments at the time of the hearing, and most of them were incorporated into (EXHIBIT 2).

SEN. BROOKE asked if the Governor's amendments (EXHIBIT 3) were offered in the House and was told they weren't. She wondered if the Committee was up against a deadline to review those amendments which had plenty of time to be reviewed by the House. **CHAIRMAN GROSFIELD** said in the hearing testimony, the Governor offered one amendment; however, that was before the letter from EPA and other letters from the National County Attorneys Association. He understood the Governor's amendments were in response to those issues which came up after the hearing.

Mark Simonich, DEQ, explained the Governor's Amendments hb029301.ate (EXHIBIT 3) as follows: (1) #1 provided the Department with the ability to undertake prosecution for criminal actions they deemed necessary, i.e. apparently the bill prohibited even criminal prosecution; (2) #2 was basically the

same thing; (3) #3, #4, #5 were just editing; (4) #6 spoke to the economic benefit portion and prohibited the Department from collecting any kind of penalties if the audit was determined to provide the immunity to the entity. This would amend back in the ability for the Department to collect the economic benefit the violator would have accrued as a result of that entity; (5) #7 was related to the form filled out by the entity doing the audit. They wanted to ensure the form wasn't so exclusive the Department wouldn't be able to gather the necessary, relative information for the specific violation; also, as the form was developed, they wanted to ensure if the format for the specific additional information wasn't included in this particular legislation, they would be able to do it within the form; (6) #8 allowed the request for the audit to be provided directly to the Department; (7) #9 provided the ability to collect the information needed which was relative to the particular violation in order to determine the extent of the damage and what it would take to correct it; (8) #10 was editing; (9) #11 added "gross negligence" because the bill currently indicated when a self-audit was done and violations were disclosed, the entity would receive immunity from prosecution as long as the activity was not purposeful or knowing on the part of the entity. This added in if the activity was a result of gross negligence, they wouldn't allow immunity to be granted to the self-audit; (10) #12 said if a specific violation had occurred previously, within three years; therefore, it was tightened up more than current language indicated; (11) #13 could be explained by Mr. Mitchell; (12) #14 added back in the idea that immunity would not be given if actual substantial damage had occurred to either human health or the environment, or if there was a threat of that substantial damage.

Larry Mitchell explained #13 by saying if the issue of primacy came up between the state and federal government, there would be some way for the state to retain primacy and obtain additional delegation of federal programs by begging off the self-audit provision. He said it could be said three ways: (1) A federal agency would never prohibit the use of environmental audits because they were a good thing; however, the issue was if the federal agency would specifically prohibit this type of act as a condition of primacy. He thought the amendment was a bit weak and didn't really say what it was intended to; (2) The existing bill adopted in the House tried to elevate the description of when primacy would be threatened from a federal agency simply saying one was threatened, to tying it to a specific federal law or formally adopted federal agency rule which said, for example, that if a state adopted an act which statutorily prohibited criminal penalties, primacy would be threatened; (3) SEN. VAN VALKENBURG'S amendment #13 tried to get very specific and got away from the formally adopted federal law or agency rule but left it to a federal agency's determination; using this approach, delegation could be threatened because Montana law would no longer be equivalent to the federal requirements or policy and this could prevent the state from assuming additional primacy act in certain cases.

CHAIRMAN GROSFIELD asked if the amendments from the Governor's office came as a package or could they be dealt with in a "pick-and-choose" fashion. **Mr. Simonich** said the Governor requested these amendments as a package.

SEN. GROSFIELD comments that HB 293 without the amendments would be in jeopardy of a veto were affirmed by **Mr. Simonich**.

SEN. BEA MCCARTHY asked if the Governor had a copy of the other amendments offered at the hearing. **Mark Simonich** said he did; in fact, he had reviewed a great deal of information between the hearing and today and that was why many of them came forward. The Governor had continued correspondence as well with MEIC relative to their suggestions for amendments to the bill. He said he didn't know what the Governor would specifically say about the other amendments offered; however, the package he sent forward were the ones the Governor insisted on being inserted into HB 293.

SEN. MACK COLE asked **Mr. Simonich** if there were any he felt more strongly about and was told the Governor hadn't indicated a priority of one over the other; in fact, no priorities were given.

SEN. VIVIAN BROOKE wondered why the Governor wanted to return to the language when what was done with the information from the environmental audit determined the stance with the federal agencies. **Mr. Simonich** said he was out of the office when that amendment was discussed, so he hadn't had direct contact with the Governor's Office on it; therefore, he was not privy to the discussion.

Anne Hedges said #13 in (EXHIBIT 2) had not been seen by the Governor's Office; in fact, she had seen a draft of the Governor's amendments in the morning and they included similar language. However, the draft she saw in the afternoon didn't contain them because of problems with the language. She said the EPA office had seen the amendment. **Ms. Hedges** expressed concern over the state obtaining primacy for programs it currently didn't have primacy for, not only in the current delegations, but in the future as well.

{Tape: 1; Side: B; Approx. Time Count: 6:30 p.m.}

Anne Hedges said all the Governor's amendments were critical and needed to be addressed by the Committee. She said there was an assumption in the amendments the Departments had certain authority which she wasn't positive they had. **SEN. VAN VALKENBURG'S** amendments clarified what the Department already thought its authority was. She referred to: (1) #7 of the Governor's amendments (EXHIBIT 3) and said if the Department felt "includes" meant "included but not limited to", the language should say that -- she wasn't sure "includes" got them where they intended to go. Usual language was "including but not limited

to"; (2) #12 was a great amendment because it went to the heart of the issue in that they didn't want a company coming forward again and again with the same violations; they wanted to avoid the possibility of a pervasive management policy in the company to use the audit law to avoid compliance, and amendment #12 got at that. However, it didn't include "parent company" as **SEN. VAN VALKENGURG'S** did, i.e. the overarching philosophy could affect an individual facility. They didn't want the parent company's philosophy to be influencing the facility to continually be out of compliance. #12 of the Governor's amendments really addressed just the individual facility could not previously have violated the law; however, it left out the overarching management issue of the company; (3) #13 avoided the issue which wasn't satisfactory.

CHAIRMAN LORENTS GROSFIELD said #9 in the Governor's amendments was identical to #8 in **SEN. VAN VALKENBURG'S** amendments, while #12 & #13 of the Governor's conflicted with #12 & #13 of **SEN. VAN VALKENBURG'S**; however, there was no conflict with the rest of both sets.

Jerome Anderson said Shell Oil Company wanted to see a reasonable environmental self-audit bill passed by the Legislature; in fact, it had been involved in getting primacy from the EPA with respect to applications for underground injection wells and finally obtained it last year. He said they were currently in the process of implementing it so they weren't interested in doing anything to jeopardize the situation of primacy; however, neither were they interested in having an environmental self-audit bill which couldn't be used because of its nature. He said if the Governor's amendments were a package, he was going to request the bill be killed because the package couldn't be accepted or supported by his client. **Mr. Anderson** said Amendment #2 took the exemption from criminal prosecution away from them if the bill passed. If the balance of the bill was reasonable and proper, they could accept it; however, if it put them into the self-incriminatory situation, they couldn't accept the bill. If HB 293 passed, none of them would use it; he also reminded the Committee he would probably be sued for malpractice if he recommended the use of this bill under those circumstances to a client, and if liability was established.

He referred to Amendment #6 and said if someone should perform a self-audit with this provision in place, that entity not only set itself up for possible criminal prosecution because of Amendment #1, but laid itself open to administrative action under the amendment. He said the term "economic benefit obtained by the regulated entity" was a subjective rather than objective term -- there was no definition of this term in the bill.

{Tape: 2; Side: A; Approx. Time Count: 6:35 p.m.}

Mr. Anderson referred to Page 2, Line 26, of HB 293 and explained it was in there to preserve some degree of confidentiality and to encourage the use of the audit procedure by the confidentiality;

the bill now provided the report and underlying data was subject to discovery in a judicial or administrative proceeding, but there was protection with rules of discovery; however, through Amendment #5, the Department could obtain the audit in its entirety, and once it hit the Department files it became a matter of public record and could appear in headlines in the newspapers.

He said Amendment #9 was a repeat of the previous amendment in the Governor's group and literally created double jeopardy because it created a new cause of action for damages in the event of a violation; therefore, not only was there a cause of action for other activity in this bill, but also in a subtle way created a new liability for damages for a violation because it required self-incrimination for criminal prosecution if it was combined with Amendment #1.

He said in Amendment #12, instead of liability being established for repeated violations within three years, it now became a "two strikes and you're out" provision, i.e. one violation in three years. He insisted MEIC thought it was a great amendment because they knew it would be impossible to use the bill; MEIC wanted "parent company" language in their amendments so if Shell Oil Company was drilling a well on the coast of Louisiana and something happened on a well, it would be responsible to an agency in Montana for the violation, which was ridiculous.

Jerome Anderson referred to Amendment #10 and asked for a definition of "imminent threat", suggesting it was subjective language, and as for "actual substantial damage", everybody knew they'd be responsible for that. He declared when regulatory statutes were being passed, they should be specific, definitive and complete; in fact, language such as was in the amendments he referred to was subjective and interpretive in nature, which would lead to many interpretations and much litigation.

He said if the legislature was comfortable with the language required by the federal government through EPA, the bill should be forgotten and companies should be allowed to go to EPA for a self-audit. He explained if the MEIC Amendments #12 & #13 were adopted, the EPA would be given the opportunity, at any time, to repeal the statute fully and completely.

Mr. Anderson said he was sorry to oppose the Governor's amendments but they had no alternative.

SEN. DALE MAHLUM commented if HB 293 was passed without the amendments, the Governor would veto it, but if it was passed with the amendments, he may sign it; however, if companies like **Mr. Anderson's** wouldn't use it, who would? **Mr. Anderson** said it seemed like a useless exercise and legislative expense to go forward if it wouldn't result in a beneficial situation.

SEN. MAHLUM said he thought HB 293 would take care of both big and little companies, and illustrated by saying he thought the

bill would allow a small junk dealer who had batteries in a corner of his junkyard to pick them up, get rid of them, get all the dirt out and put fresh dirt in -- do something good for his little operation. **Mr. Anderson** said it would but if the bill was in the form requested by the Governor's Office or MEIC, when the junk dealer dug up his batteries, performed and reported an environmental self-audit, he would be exposing himself to criminal litigation with civil and administrative penalties. He said the dealer would have to give the Department and whoever was prosecuting, all the information he had; therefore, he would lose the Constitutional protection from self-incrimination.

SEN. MIKE TAYLOR said he had amendments (**EXHIBIT 4**) to exempt small operators from these regulations because he thought the premise of the bill was the small guy should have the ability to clean up. He said he basically agreed with the Governor's amendments, except for #12 & #13. He said there had to be some protection in the bill and the thought there was a balance between business and environment. He said when HB 293 was heard, the Governor said he supported it, except for one small amendment; however, now he said, after reviewing the bill completely, there were some problems. He reiterated he supported the Governor's amendments; however, **Jerome Anderson** may be right in that big companies might not use the bill, and he didn't think the bill could be balanced if several amendments were removed.

SEN. MACK COLE suggested some things could be worked out together, explaining there might be nothing if some of the amendments were left on, i.e. not everybody would be able to use the bill. He said he presently would have a difficult time going along with any amendments until they could be worked out.

CHAIRMAN LORENTS GROSFIELD referred to Amendments hb029307.alm (**EXHIBIT 4**) and said basically, there was a sunset and the time frame was changed from 30 to 15 days. He said there were basically three sets of amendments before the Committee and suggested there were three options: (1) Wade through the amendments, either package by package or amendment by amendment now; (2) Postpone actions until after adjournment tomorrow; (3) Table the bill.

Substitute Motion/Vote: **SEN. MIKE TAYLOR MOVED TO ADJOURN UNTIL THE NEXT EVENING (APRIL 3) TO GIVE TIME TO REVIEW ALL THE AMENDMENTS. Motion CARRIED 7-3 ON A ROLL CALL VOTE.**

MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By CHAIRMAN LORENTS GROSFIELD, on April 3, 1997,
at 6:30 PM, in Room 405

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. William S. Crismore, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Mack Cole (R)
Sen. Thomas F. Keating (R)
Sen. Dale Mahlum (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Mike Taylor (R)
Sen. Fred R. Van Valkenburg (D)

Members Excused: None

Members Absent: None

Staff Present: Larry Mitchell, Legislative Services Division
Gayle Hayley, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: None
Executive Action: HB293

EXECUTIVE ACTION ON HB293

Amendments:

CHAIRMAN GROSFIELD asked Larry Mitchell to explain the grey bill
he prepared for HB293.

Larry Mitchell passed out the Grey Bill, (EXHIBIT 1), and four
sets of amendments.

Amendments Requested by the Governor, hb029301.ate,
(EXHIBIT 2).

Amendments Requested by SEN. FRED VAN VALKENBURG, hb029313.alm,
(EXHIBIT 3).

Amendments Requested by **SEN. MACK COLE**, hb029308.alm,
(EXHIBIT 4).

Amendments Requested by **SEN. MIKE TAYLOR**, hb029307.alm,
(EXHIBIT 5).

Mr. Mitchell said these amendments were to replace yesterday's amendments. The governor's amendments and **SEN. VAN VALKENBURG'S** amendments were incorporated in the Grey Bill. The third set of amendments by **SEN. COLE** are some of the Governor's amendments, and all of **SEN. TAYLOR'S** amendments. Those were incorporated as well in the Grey Bill as **SEN. TAYLOR'S** amendments were. **SEN. COLE'S** amendments 8 and 9, were late editions and were not incorporated in the Grey Bill.

Mr. Mitchell said he made a key for the Grey Bill, where the Governor's amendments had been shown as shadowed and the amendment number is circled.

SEN. VAN VALKENBURG'S amendments were shown as a double underline and the number of the amendment was circled twice. **SEN. TAYLOR'S** amendments were shown as shaded and bolded language, and the amendment numbers coincide with the box. **SEN. COLE'S** amendments appear in the bill because they are segments of the Governor's and **SEN. TAYLOR'S** amendments.

CHAIRMAN GROSFIELD asked **Director Simonich** to speak on any changes that might of occurred to the Governor's amendments.

Director Simonich said there were discussions with the Governor that afternoon relative to the amendments he put forward, particularly, because of questions asked by the committee yesterday in the hearing in terms of the Governor seeing it as a package or if there was prioritization on some amendments. The Governor would like to have the following amendments:
1,2,3,4,5,7,10,11.

Director Simonich said in reference to amendment No. 6, the amendment dealing with economic benefit, the Governor felt that the majority of the violations that would occur associated with the self-audit bill, would be violations that would depict "oops" activities. He said the Dept. did not expect cases where the violations would be purposeful or grossly negligent. If it was a grossly negligent situation, the bill already gives us the full ability to collect all of the penalties that may be prescribed under the law, including the economic benefit. **Director Simonich** stated that the Dept. was trying to encourage people to come forward so that we can help them correct their problems. He said he didn't feel collecting economic benefit from those companies was appropriate or necessary and the Governor would agree not to pursue amendment No. 6.

Director Simonich said amendment No. 8 and 9 of the Governor's package, both dealt with the Dept.'s ability to collect information to determine what the violations were, and how the violation needed to be fixed.

He did not think there was any opposition to amendment No. 7. The Governor would be willing not to ask for amendment No. 8, which requires or allows the Dept. to request the audit, if the Governor can have amendment No. 9. This amendment helped clarify that the Dept. may request all the relevant facts and data that the Dept. needs to independently establish the nature and extent of that violation to determine whether or not all the damage created by the violation has been corrected. He said for a violation that has been disclosed to the Dept., we need to determine what the violation was and that all appropriate steps were taken to correct that violation. **Director Simonich** added that the Dept. wasn't interested in finding out every other aspect of what was going on in the business through a self-audit.

Director Simonich associated amendment No. 12 with the bad actor provision. He said in reference to an entity not getting immunity after continually violated a law, the bill originally said, "has established a pattern of repeatedly violating these laws," and the Governor felt "repeatedly" was a bit open-ended and that was why the Governor suggested "previously." Now, he suggested that the words instead read, "has established a pattern of violating." That gave the Dept. some discretion and the ability to look at that violation, of that statute, and that particular entity, and determine if it was something they saw over and over, or if it was a one time occurrence.

SEN. GROSFIELD wanted to clarify that the language would read "the regulated entity has established a pattern of violating a specific state or federal law." **Director Simonich** responded that was affirmative.

Director Simonich referred to amendment No. 13 as the escape clause. The Dept. recognized that the language suggested by **SEN. VAN VALKENBURG** was more workable and recommended his language be used. He said the provisions in this audit would not be able to be used if, in some fashion, these specific provisions of this bill would threaten the state's primacy over those programs. He noted that the state still has to deal with EPA, and their guidance of operations, but the Dept. would be allowed to deal with EPA on a point by point basis.

Director Simonich said amendment No. 14, the imminent threat issue, was discussed and it was felt that it did not need to be in the bill. He gave the example of an innocent accident that had occurred near Alberton, where the second largest spill of Chlorine in the history of the United States resulted from a train derailment. The Dept. worked with the entity to clean it up and no enforcement action was taken. That caused an imminent threat, but it was clearly not from negligence or done purposely. They felt the above situation was going to be the typical case. When it was that type of situation, they felt that imminent threat did not need to be included in the bill. He reiterated that if there was gross negligence, on the part of the business entity, then all the other enforcement actions that are

enforceable, still apply, and they do not get immunity. **Director Simonich** said the Dept. did not believe imminent language needed to be established in the bill as well.

SENATOR DALE MAHLUM asked **Director Simonich** about the Chlorine spill and if he said it wasn't an imminent threat?

Director Simonich replied that there was no doubt that there was an imminent threat. The Dept. did not feel it would make any sense to take away immunity from a company for disclosing something like that when it was purely an accident.

SEN. MAHLUM asked if there would be any difference if it was being stored in a building and the spill occurred?

Director Simonich replied yes and there would be a large difference. If it was not stored properly, it could have been gross negligence.

SEN. TOM KEATING asked **Director Simonich** on the Governor's amendments then, we can strike No. 6, 8, and 14? Affirmative.

SEN. TAYLOR asked about amendment No. 13.

Director Simonich said on the Governor's amendment No. 13, it was proposed to strike "law" on line 21 all the way through rule on line 22, where it talked about federally adopted laws and federally adopted rules. "Agencies specifically prohibited environmental audits," would be inserted.

SEN. VIVIAN BROOKE asked **Director Simonich** who all was involved in the work?

Director Simonich responded that there was a meeting today in the Governor's office with reporters, environmental groups, industry groups, and himself. Since then, he said we have met with just the **Governor Racicot**, **Lieutenant Governor Martz**, **Judy Browning**, **Chief of Staff, Julie Lapeyre**, **Policy Advisor for Natural Resources**, and himself. That small group that went through and talked about every specific amendment and worked through it. It was strictly within the Governor's office, the staff and himself.

SEN. BROOKE commented she wanted to get the situation clear. The bill came in the House, and the Governors Office was in support of it. Yesterday, there were amendments by the Governor that were packaged, and now we are peeling off some of those amendments. Is that correct? **Director Simonich** said that was correct.

SEN. KEATING asked about the Governor's amendment on the April 3 sheet, if No. 3, 4, and 5 were just subsection renumbering?

CHAIRMAN GROSFIELD said they actually go with No. 6.

for environmental audits that is left to deal with by the Dept. **SEN. VAN VALKENBURG** elucidated what may be involved could be more serious than 24 batteries buried out in the backyard or the industry people would not be as interested in this bill as they are. They are worried about significant violations.

CHAIRMAN GROSFIELD asked **Eric Finke** of EPA, about the language in the Amendment No. 13. The language in Sub 1 says "would cause" and in Sub 2 it says "would prevent." How would the EPA communicate to the State of Montana something that "would cause" or "would prevent." How would that communication take place, both in terms of what it would look like, and in terms of timing.

Eric Finke, EPA, responded that in terms of reviewing whether a particular program of the State meets the delegation requirements, the delegation requirements are set out in both federal statute and regulation. Those are the standards EPA uses to compare a State statute and its accompanying regulations to see if they meet the federal requirements. If so, then the program can be delegated. It is done through federal register notice, and he also noted that withdrawal would be done through the federal register notice. During the interim period, there probably would be an extended legal review of the State's laws, to determine if the State of Montana still met the delegation standards with the new law coming on the post. There would be some communication with the Attorney General's Office asking for their interpretation of certain laws. Ultimately, the legal analysis would be done, and the conclusions of that would be published in the federal register. He said there would also be some communication in writing to the State agency and to the Governor as well, informing them of the results of the review.

CHAIRMAN GROSFIELD asked if the actual trigger would take place by the notices on the federal register?

Mr. Finke said the notices on the federal register was the formal mechanism to approve or withdraw.

CHAIRMAN GROSFIELD asked **SEN. VAN VALKENBURG** about the timing situation if this bill passed and an audit was done and sometime down the road, a trigger resulted in a notice given in the federal register. What will that do to on-going actions that have already occurred or started. Is there any sort of legal problem there?

SEN. VAN VALKENBURG replied that there was certainly a legal problem there. He could foresee an argument being made by entities that came forward with self-audits, saying that they relied on the fact that the law was in place, so how can you come back now and seek criminal or civil penalties. **SEN. VAN VALKENBURG** believed that the EPA would clearly be in the position to come back at Montana and say, that they had been given plenty of notice, back when this bill was being considered in the Mt. Senate. Because everyone was aware of the letter written by **Mr.**

Larry Mitchell added that all that remained of Amendment No. 2 would be the last two lines. The first two lines set up for Section 2 would be added to the bill. Amendment No. 3, 4, and 5 are just renumbering to set up Section No. 2. Amendment No. 6 is the New Section No. 2, which provides for the assessment for the administrative civil economic penalties. He stated if Section No. 2 or amendment No. 6 basically is not offered, then 5, 4, 3 and the first two lines of Amendment No. 2 go away.

{Tape: 1; Side: A; Approx. Time Count: 6:45; Comments: None.}

SEN. KEATING asked Director Simonich if No. 6 could be struck?

Director Simonich said yes, No. 6 could be struck.

SEN. KEATING asked if you allow No. 6 to be struck, then you don't have to make the technical changes in No. 3, 4, and 5?

CHAIRMAN GROSFIELD answered yes, along with part of amendment No. 2.

SEN. KEATING clarified if 3, 4, and 5 go away, you just rearrange No. 2. Affirmative answer.

Motion: SEN. TAYLOR MOVED THE GOVERNOR'S AMENDMENTS.

Discussion: SEN. VAN VALKENBURG had a question for Director Simonich about why the Governor has decided in the last few hours, that Amendment No. 6 was no longer necessary. He understood Director Simonich's explanation, as believing the violations here would be the "oops" violations. He said a week ago, this Committee received a letter from John Wardell, State Director of EPA, and in that letter, Mr. Wardell said that while incentives should be offered for voluntary compliance, EPA believes, that in fairness to law-abiding companies, violators should not be allowed to retain the benefits of their violations. Therefore, it is important that penalties be imposed to remove any significant economic benefit gained from non-compliance. Why did the Governor, now think, that the language from Mr. Wardell was not important enough to put into the statute?

Director Simonich replied that significant non-compliance would lead to not being able to use the immunity provisions of this bill. The Dept. would still have the ability under the statutes, to proceed for all the penalties, including the economic benefit for cases of gross negligence. We make the argument to EPA that we believe that the amended bill would allow the Dept to collect the economic benefit in those situations where companies had attempted to circumvent the standards in order to try to gain some advantage of economic benefit.

SEN. VAN VALKENBURG retorted that he did not think that was what Mr. Wardell meant. He clearly would be accepting purposeful or knowing activity, because that kind of activity is subject to criminal prosecution. He said negligence is a legitimate subject

Wardell and his concerns, the EPA was going ahead and proceed to revoke primacy. Then in order to retain primacy, the Department of Environmental Quality, in essence, through its own rule making process, would have to pull the plug on self audits, or through some executive order, declare that this particular section is now revoked. Next, affected members of the public might then say there never was a self audit act in place, and penalties ought to be assessed against these violators.

CHAIRMAN GROSFIELD asked **Director Simonich** the same question.

Director Simonich first responded that revoking primacy would be a very lengthy process, and could take years. He did not see the situation any different from the current situation today. He explained that the Dept. has delegated authority, in the federal programs given to the state. If there has been a violation determined, the Dept. then decides if an enforcement action will be taken. In the cases where EPA found the violation and the state has not, the EPA then notifies the Dept. and they tell us that the State of Montana has so many days to take an action and if action isn't taken, then the EPA will take the action. He suspected that in fairness to the businesses that came forward trying to use and implement the Self-Audit, the Dept. would continue to try and work with them, and simply choose at that point in time, not to take any enforcement action and let EPA take that enforcement action if they so chose. This bill specifically indicated that nothing in this bill prohibits the federal government from taking that action at any point in time.

CHAIRMAN GROSFIELD asked **Mr. Anderson** to respond to that.

Mr. Jerome Anderson, Attorney for Shell Western Exploration and Production Inc., responded that it sets up an opportunity outside of the Legislature for a federal entity to essentially make this law null and void, at a undetermined date in the future. He thought that some things that have happened in good faith up to that point are in some jeopardy.

Mr. Anderson addressed the amendments presented by the Governor and said he would not oppose those amendments, providing amendment No. 6, 8, and 14 would be stricken and the amendments technically corrected to conform to the requirements. With respect to No. 13, he thought we could get along with that provision. He commented if the federal government were to take action with respect to removing primacy, the length of time required to obtain primacy, could feasibly be longer than two years. He did think that if an effort were made to prosecute someone who had commenced an audit proceeding in good faith, reliance upon the statute, would be a possibility of protection. **Mr. Pilcher** had some additional comments that he would like to make with respect to that issue.

{Tape: 1; Side: B; Approx. Time Count: 7:00; Comments: Turned Tape Over..}

Mr. Steve Pilcher, Western Environmental Trade Association, said he had spent a fair amount of time dealing with EPA in water and other environmental programs, and felt that **SEN. GROSFIELD'S** concern was never going to develop. The reason for that, he concluded, was the politics involved. In those programs where a delegation has been granted, there is an agreement between the State and the EPA, that any enforcement action that might be taken, or failed to be taken, has to be reviewed by the EPA. They would have an opportunity at that time, to either approve or disapprove any enforcement action that was taken, or send the notice of violation letter, giving the State of Montana 30 days in which to act. All of those violations that might be in limbo are going to have to be addressed by the State and EPA before the issue of primacy ever comes about. He did not believe that the situation of having a number of lingering cases would exist. If there were cases lingering, it would be subject to the change in policy by the EPA at the time they reached a decision on delegation. Then EPA would have to look at each case individually, on a case by case basis. EPA would also have to look at the delegation under each act individually, such as the Federal Safe Drinking Water Act, the Federal Clean Water Act, etc., and go through the same process for each case. **Mr. Pilcher** hoped that the environmental audit provision meet the requirements as outlined in the proposed amendment.

CHAIRMAN GROSFIELD asked **Director Simonich** for clarification in reference to the language where it says, "would prevent the State from obtaining primacy," and the language in the bill on page 3, line 9 and 10, where it says, sections 1 through 5 do not apply to a violation if: Section 1 through 5 would prevent the State from obtaining primacy. He wanted to clarify if that was for any kind of primacy, or primacy that was related specifically to the violation.

Director Simonich replied that he did not know exactly how EPA would review that.

CHAIRMAN GROSFIELD asked **Mr. Finke, EPA,** about the primacy issue. He commented that he was presuming that this language intends to mean any kind of primacy. He was trying to clarify that for the record. Is that your interpretation of that?

Mr. Fink, EPA, said he did not think he could answer that question.

SEN. VAN VALKENBURG responded to the question and said it would basically be saying that Sections 1-5 of the bill, do not apply to a violation if those same sections would prevent the state from obtaining primacy. Therefore, if the EPA said that this particular bill prevents us from obtaining primacy on anything, even though the violation is not related to that particular issue, then all the stuff about immunity do not apply to that

violation. He said that is the clear language of that particular section.

Mr. Pilcher wanted to add some comments to what SEN. VAN VALKENBURG had said. He said that one has to keep in mind that each of these program delegations is considered separately. If the state should choose to seek additional delegation, or delegation of additional programs, under the underground injection control program, they would have to put together an application package which would be intended to address the delegation requirement and the EPA would have to make a decision on that application itself. And to say aye or nay to that application would not have any effect directly on the other programs, and that each would have to be considered separately.

CHAIRMAN GROSFIELD asked the members of the Committee if there was anymore discussion?

Motion: SEN. TAYLOR MOVED THE GOVERNOR'S AMENDMENTS.

Larry Mitchell clarified that the Governor's Amendments without No. 6, 8, and 14.

The Amendments under consideration are numbered hb029301.ate and they include: No. 1, the last two lines of No. 2, No. 7, No. 9, No. 10, No. 11, No. 12 with modifications on page 3, line 13, where it would strike "repeatedly violated," and insert "has established a pattern of violating," and No. 13.

{Tape: 1; Side: B; Approx. Time Count: 7:15; Comments: None.}

Discussion: SEN. TAYLOR said he felt comfortable with the amendments overall, but would like to see a few of his amendments on the bill such as a termination date. He thought the bill would help protect the environment and at the same time give companies a chance to clean up environmentally without being penalized.

SEN. VAN VALKENBURG wanted to have a vote on his amendments and thought it would be more appropriate.

Substitute Motion: SEN. VAN VALKENBURG MOVED TO ADOPT THE VAN VALKENBURG AMENDMENTS.

Discussion: SEN. VAN VALKENBURG said there is some importance in meeting the issues set out in EPA's letter, which was a statement of EPA's policy, and he thought if the state is to attain primacy, we need the things that were in his amendments.

CHAIRMAN GROSFIELD made a comment that he could not support those amendments because he thought some of the amendments went way beyond what the Legislature could support, such as the bad actor provision. He cited an example of No. 12, that talks about going after the facilities's parent organization in the last five years. He mentioned the fact that companies may have operations

in 20 states and foreign countries. If the company violated any laws anyplace in the last five years, then the audit privilege in this law would not be available for them.

CHAIRMAN GROSFIELD commented on amendment No. 3, which he felt went way beyond what should be done. For example, in No. 3, the language stated, "immediately report to the Dept." He thought that statement seemed very ambiguous.

SEN. VAN VALKENBURG retorted to **CHAIRMAN GROSFIELD'S** concerns by reading directly from EPA's document that sets out incentives for self-policing discovery disclosures and the direction and prevention of violations. He referenced the federal register, dated Friday, December 22, 1995, page 66709, which set out the conditions EPA believed that self-policing would be appropriate. The EPA said, in response for request from commentaries, EPA has established bright lines to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by insuring the penalties are not waived for repeat offenders, under condition D 7. "The same or closely related violation must not have occurred previously, within the past three years, at the same facility, or be part of a pattern of violations on the regulated entities part, over the past five years."

He said that above statement is no different than what was in his amendment. It is just the EPA policy. He did not think it was going too far or that it was out of line.

Vote: **SEN. VAN VALKENBURG'S AMENDMENTS, MOTION FAILED, 7 TO 3, WITH SEN. MCCARTHY, SEN. BROOKE, AND SEN. VAN VALKENBURG VOTING AYE.**

Vote: **GOVERNOR'S AMENDMENTS, MOTION CARRIED UNANIMOUSLY.**

Motion: **SEN. TAYLOR MOVED AMENDMENT hb029307.alm, Prepared by Larry Mitchell, provides for a termination date of 2001. Line 5, on page 2, line 4, strikes 30, and inserts 15.**

Discussion: **SEN. KEATING** asked what was the purpose of having a sunset on the bill? He did not see a reason for it.

SEN. TAYLOR had a concern that legislation be reviewed in the future. He believed that 30 days was a little bit long to report a violation, and did not feel industry had a problem with going to 15 days.

SEN. CRISMORE said he did not have a problem with the other amendments but he did not feel a sunset clause necessary.

SEN. MILLER believed 15 days was too fast of a time frame to report the violations. He said he was not going to support the amendment.

Vote: Motion to adopt Amendment hb029307.alm, FAILED, 6 TO 3. MCCARTHY, VAN VALKENBURG, TAYLOR, (WITH BROOKE ABSENT).

Motion: SEN. VAN VALKENBURG MOVED TO ADOPT THE GOVERNOR'S AMENDMENTS, NO.6 AND NO.14. (INCLUDE 3,4,5 IF NEEDED BY VIRTUE OF ADOPTING NO.6)

Discussion: CHAIRMAN GROSFIELD commented on No. 6, the economic benefit issue, where he believed it would be difficult for anyone to equitably determine a specific amount of economic benefit. He felt that No. 14, the imminent threat issue, was too nebulous or subjective.

Vote: Motion to adopt No. 6 and 14 of the Governor's Amendments FAILED 7 TO 3, WITH SENATORS MCCARTHY, VAN VALKENBURG, BROOKE, voting aye.

Motion: SEN. KEATING MOVED THAT HB293 BE CONCURRED IN AS AMENDED.

Discussion: CHAIRMAN GROSFIELD said to the committee to remember that the goal was to provide another tool for cleaning up some past and present environmental problems in the State of Montana. He concluded it was a bold step in some ways, but it was a positive step forward. He added that even the EPA has a policy of approving environmental audits, although not exactly in this format, but the EPA understands the benefits involved. In the course of the testimony, many of the opponents indicated that they supported some kind of a concept of an environmental audit. People understand there is potential for environmental audits to have a very positive effect. CHAIRMAN GROSFIELD emphasized that we need tools to clean up and improve the environment, and that was what this bill does, and he supported the motion.

{Tape: 1; Side: B; Approx. Time Count: 7:30; Comments: None.}

SEN. VAN VALKENBURG followed up the discussion and said it could be a good step if we had done some of the other things that he offered as amendments that were rejected. He said at this point, it will create litigation, division between the environmental community and the regulated community, and the Dept. of Environmental Quality will get thrown in the middle of it. Its not going to be a positive situation given the context of how this bill is becoming law. He thought it was interesting to watch the process over the course of the last week, particularly the last 24 hours. He could not believe the incredible amount of what he called, arrogance, that the regulated entities here showed when the bill first arrived in front of this committee. It appeared that they were saying, we can do whatever we want, and you can just take it or leave it. Fortunately, the Governor of this state was not as easy to roll over as the House of Representatives. The Governor got in the way and said you are not going to do that.

SEN. VAN VALKENBURG said it was interesting to watch just the change in the attitude of the lobbyists of this legislation from yesterday to today, when they came to grips with that the fact that the Governor wasn't going let them roll over the top of him. He reiterated the fact that the law was being broken and essentially, the people we're referring to were asking to give them immunity from breaking the law. **SEN. VAN VALKENBURG** brought up other people that broke the law such as burglars, bad check writers, or domestic abusers. He wondered if the Legislature would be as eager to give them immunity because they said that they wanted to go in the right direction and make things right. He felt it might not be bad for some of these environmental violations to be prosecuted and then they might appreciate a little bit more what it meant to get immunity. He thought even with respect to burglars and thieves and others, there might be a good reason to give them a second chance to help them out. There might be even more of a reason to be helping out more people who are employing people, and who are making the economy of this state run. But he did not think that we should ever be in the position where we think we have to roll over because those people tell us they're going to have it their way.

{Tape: 1; Side: B; Approx. Time Count: 7:45; Comments: None.}

SEN. MILLER commented that he had to take exception to what **SEN. VAN VALKENBURG** had said. He said the Governor was not the only one to show concern on this bill when it came to this committee. **SEN. TAYLOR, CHAIRMAN GROSFIELD**, showed concern along with others. To say that industry groups came in and was going to do whatever and thank goodness, the Governor rode in on his white horse and saved the day, was not accurate. He said this was not the first time immunity was being granted, and there was immunity for different crimes presently. He mentioned that the IRS allowed immunity for taxes. That's the law, you have to pay your taxes. If you can't, under certain circumstances, there were things that can be set up to where you don't have to pay it all, and the IRS will work a deal. There is certain crimes that have been allowed in the past that will allow immunity. OSHA, comes in and allows immunity if they can come in and do an audit on your business and find problems in there. If you invite them in, they won't fine you. If they come in because they have had a complaint, then you get fined. This was not a new idea or concept, he reminded the committee. He felt this is where we need to be going for the same reasons as OSHA because they want to make sure the shops are safe. The businessmen that have the shops want to make sure they have a safe place for their employees. **SEN. MILLER** believed that this legislation was one more tool to be used to help have a clean environment, and was in support of this bill.

SEN. CRISMORE also wanted to go on record as saying that he did not feel that the door was being opened for violations where they can come back and say I violated the law, now I want immunity. He did not believe that was the idea of the bill. In the logging

industry, which he was familiar with, they had already been doing audits. When the industry has SMZ violations, at this point in time, they could be cited for that. He did not feel anyone was doing it intentionally. If someone called in and said, hey, we have a SMZ violation, we would like you to come out and look at it with us, and let's clean it up. He said that was what this bill was all about. It's not to give people the right to break the law.

SEN. MAHLUM said what this bill was about according to his feelings, was it gave an individual a chance to clean that dirt up. He gave an example of a small automotive business, where there might of been oil spills in the yard. He can take care of the problem without getting fined.

CHAIRMAN GROSFIELD made one final comment. He said we are not necessarily talking about people who are breaking the law here. We are talking about the potential of finding a problem that may have happened before a law was even put into place. It may of been there for a long time. It may not be a responsible party. We are definitely not talking about people who purposely or knowingly break the law. Page 3, line 11, said this does not apply if you purposely or knowingly break the law. He felt it was more like are you going to clean it up or are you going to hide it. Or maybe even, are you going just go out of your way not to find it, or not even look for it, versus, has some ability to move forward responsibly and clean it up.

Vote: MOTION CARRIES 6 TO 4, WITH SEN. BROOKE, MCCARTHY, VAN VALKENBURG, TAYLOR VOTING NO.

The final amendments were combined and completed by **Larry Mitchell** and are attached as **(EXHIBIT 6)**.

CHAIRMAN GROSFIELD adjourned the meeting at 8:05